Supreme Court, U.S.
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In The

Supreme Court of the United States

FRANK CUSTABLE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MARC W. MARTIN*
**Counsel of Record*
MARC MARTIN, LTD.
53 West Jackson Blvd.
Suite 1420
Chicago, IL 60604
(312) 408-1111
mwm711@mac.com

JEFFREY B. STEINBACK
53 West Jackson Blvd.
Suite 1442
Chicago, IL 60604
(847) 624-9600

Counsel for Petitioner Frank Custable

COCKLE LAW BRIEF PRINTING CO. (800) 225 6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the *Ex Post Facto* Clause is violated by the imposition of an enhanced sentence based on United States Sentencing Guidelines that were not in effect when the petitioner committed the offenses.

2. Whether the *Ex Post Facto* Clause is violated by the application of the United States Sentencing Guidelines' one-book rule to enhance Guidelines for offenses committed before the enactment of revised Guidelines.

PARTIES TO THE PROCEEDING

Petitioner and Christine Favara were parties in the Seventh Circuit. Petitioner is the only party in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Frank Custable respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1-12) is published at 615 F.3d 824.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 9, clause 3 of the United States Constitution provides in pertinent part, "No . . . *ex post facto* Law shall be passed."

United States Sentencing Guidelines § 1B1.11 provides:

> **Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)**

(a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.

(b) (1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

(2) The Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual. However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes.

(3) If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses.

STATEMENT

In sentencing petitioner to 262 months in prison on fraud and obstruction related convictions, the district court, over petitioner's objections, relied on the United States Sentencing Guidelines Manual in effect on the date of sentencing. Guidelines in effect when petitioner committed the fraud offenses, however, produced a significantly lower sentencing range.

The relationship between the *Ex Post Facto* Clause and amended, more onerous Guidelines has sharply divided the circuits. The Seventh Circuit, where petitioner was sentenced, has categorically rejected application of the *Ex Post Facto* Clause under circumstances such as those presented here. Even after *United States v. Booker*, 543 U.S. 220 (2005), however, retroactive application of the Guidelines, as a practical matter, substantially risks increased punishment.

1. Through the Sentencing Reform Act of 1984 ("SRA"), Pub. L. No. 98-473, 98 Stat. 1987, Congress established and delegated authority to the United States Sentencing Commission to prepare Sentencing Guidelines to "further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation." U.S.S.G., 1. Original Introduction To The Guidelines Manual, 2. Statutory Mission. Following legislative directives, the Sentencing Commission initially submitted Guidelines to Congress in April 1987. *Id.* at 1, Authority. "After the prescribed period of Congressional review, the

guidelines took effect on November 1, 1987, and appl[ied] to all offenses committed on or after that date." *Id.* at 2. Statutory Mission.

Absent enactment of emergency Guidelines pursuant to legislative directive, the Sentencing Commission annually submits revised Guidelines to Congress by May 1st. 28 U.S.C. § 994(p). "Such . . . amendment or modification . . . shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress." *Id.*

2. Under Guidelines in effect until October 31, 2003, the fraud convictions at issue here called for a base offense level of 6. U.S.S.G. § 2B1.1(a) (2002). Under Guidelines in effect until January 24, 2003, a 4-level increase to the offense level for fraud convictions was required if the offense involved more than 50 victims. U.S.S.G. § 2B1.1(b)(2).

Pursuant to the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, the Sentencing Commission, *inter alia*, passed an emergency amendment effective January 25, 2003, requiring a 6-level increase to the offense level for fraud if the offense "involved 250 or more victims." U.S.S.G., App. C., Amend. 647 (creating U.S.S.G. § 2B1.1(b)(2)(C)). In an amendment effective November 1, 2003, also pursuant to Sarbanes-Oxley,

the base offense level for fraud was increased from 6 to 7 "if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more." U.S.S.G., App. C., Amend. 653 (creating U.S.S.G. § 2B1.1(a)(1)).

3. *United States v. Booker*, 543 U.S. 220 (2005), eradicated the mandatory nature of the United States Sentencing Guidelines on Sixth Amendment grounds. *Booker* did not dispense with the Guidelines altogether – they remain an important part of the Federal sentencing process on a non-mandatory basis. While the sentencing court must initially consult the Guidelines and determine the appropriate sentencing range, the sentencing judge cannot presume correctness of a sentence within the Guidelines range. *Nelson v. United States*, 129 S.Ct. 890 (2009) (*per curiam*); *Gall v. United States*, 552 U.S. 38 (2007); *Rita v. United States*, 551 U.S. 338, 351 (2007); see also *Spears v. United States*, 129 S.Ct. 840, 843-44 (2009). Rather, the SRA still requires "a sentencing court to consider Guidelines ranges. . . . but it permits the courts to tailor the sentence in light of other statutory concerns as well." 543 U.S. at 245-46.

With respect to appellate review post-*Booker*, sentences are to be reviewed for reasonableness under an abuse of discretion standard. *Kimbrough v. United States*, 552 U.S. 85, 111 (2007); *Gall*, 552 U.S. at 41; *Booker*, 543 U.S. at 262. An appellate court "may, but is not required to, apply a presumption of

reasonableness" to a sentence within the Guidelines range. *Gall*, 552 U.S. at 51; see also *Rita*, 551 U.S. at 347 (appellate presumption is not "binding," and may be rebutted by a showing that a sentence is unreasonable in light of 18 U.S.C. § 3553(a) factors).

4. In April 2005, petitioner, eight other individuals and two companies controlled by petitioner were named as defendants in a 22-count indictment. R. 1. Counts 1-17 alleged a series of wire and mail fraud offenses. 18 U.S.C. §§ 1341, 1343. Counts 18 and 19 charged petitioner and others with filing false statements with the Securities and Exchange Commission ("SEC"). 15 U.S.C. § 77x. The indictment also contained two obstruction of justice counts, 18 U.S.C. §§ 1503(a) and 1505, and one contempt count. 18 U.S.C. § 401.

Petitioner entered a blind guilty plea to Counts 1-8, and 11-22.[1] In a written declaration, petitioner admitted to conduct charged in the indictment. Pet. App. 28-54. As petitioner admitted, the wire/securities fraud scheme lasted between April 2001 and June 2002. During that period, petitioner illegally acquired "penny" shares of financially-distressed, publicly-traded companies, caused the market to be

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[1] Although petitioner was charged in Counts 9 and 10, he did not plead guilty to those counts and they were ultimately dismissed. 7/11/09 Tr. 3; 6/9/09 Tr. 13.

stimulated artificially through spam e-mail, and then attempted to sell the stock for a profit. In acquiring the stock, petitioner circumvented securities registration laws by filing false SEC forms.

One of the obstruction of justice charges related to the communication of false information to the SEC by a co-schemer in July 2002. The remaining obstruction charge and contempt count related to petitioner's violations of an asset freeze order entered in a civil case brought by the SEC. The illegal withdrawals from the bank accounts at issue occurred in March and April 2003. Pet. App. 44-45. Petitioner's violation of the asset freeze order was used in aggravation in an earlier obstruction of justice case in which petitioner was the defendant, *United States v. Custable*, 02 CR 1105-01 (N.D. Ill.) (Anderson, J.). 5/19/09 Tr. 38-43; R. 352.

5. In his written guilty plea declaration, petitioner asserted that the 2001 version of Guidelines governed. Pet. App. 45-46. The Presentence Investigation Report ("PSR") however, recommended application of the 2008 Guidelines based on *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007). PSR 8. The PSR concluded that petitioner's base offense level should be set at 38. Because the petitioner fell in criminal history category II, the ensuing advisory sentencing range under the Guidelines was 262-327 months imprisonment. The PSR noted that "[t]he November 2002 edition of the Guidelines Manual, which was in effect during the commission of the offense, appears to be more

favorable to the defendant," and concluded that the total offense level would be 35 under those Guidelines. PSR 8, 29.

In his sentencing submission to the district court, petitioner again urged use of the 2001 Guidelines. R. 338. Petitioner argued that use of current Guidelines would violate the *Ex Post Facto* Clause. The government, on the other hand, requested the court to use the current Guidelines. R. 340.

At the initial sentencing hearing, the district court recited the PSR's 2008 Guidelines calculations (Pet. App. 56-57), which it later accepted in full. See *United States v. Custable*, No. 09-2593, Deft's Brief, Required Short App. (7th Cir.). The court determined, *inter alia*, that the base offense level was 7, and further increased petitioner's base offense level by 6 levels because the offense involved more than 250 victims. Consistent with the PSR, the district court set the final offense level at 38, criminal history category II. *Id.*

In sentencing petitioner, the district court described the Guidelines range as "quite high." Pet. App. at 63. Although the court found petitioner to have "been very forthcoming and . . . provided extensive cooperation" to the government, it did not deviate downward from the Guidelines range. *Id.* The court found it necessary to impose a lengthy sentence within the Guidelines range, and sentenced petitioner to 262 months imprisonment. *Id.* at 18, 67, 72.

Petitioner thereafter filed a motion to correct the sentence. R. 352. Petitioner reasserted that retroactive application of disadvantageous Guidelines violated the *Ex Post Facto* Clause. The district court denied the motion. Pet. App. 13-15. The court found that *Demaree* foreclosed granting any relief on *ex post facto* grounds.

6. Petitioner appealed, raising multiple points relating to his sentence. The Seventh Circuit affirmed. Pet. App. 1-12. The court of appeals rejected petitioner's *ex post facto* claim, stating as follows:

> Finally, we dispose of Custable's argument that the court's reliance on the 2008 version of the Guidelines violates the Constitutional prohibition against ex post facto laws. Custable claims that the 2008 Guidelines impose a more serious offense level, and thus a harsher sentence, than the Guidelines in effect in 2001 or 2002 when he committed the offenses. Section 2B1.1 of the 2002 Guidelines calls for a base offense level of six, and a four-point enhancement for the number of victims, instead of the six-point increase Custable received under the 2008 Guidelines. But this argument is foreclosed by *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006). In *Demaree*, we held that, because the Guidelines are only advisory in nature, a court's use of a later version does not offend ex post facto. *Id.* We find no reason to abandon that conclusion today. *United States v. Nurek*, 578 F.3d 618, 626

(7th Cir. 2009); *see also United States v. Panice*, 598 F.3d 426, 435 (7th Cir. 2010).

Pet. App. 8-9.

REASONS FOR GRANTING THE PETITION

For over two hundred years, the *Ex Post Facto* Clause has been interpreted to preclude retrospective application of "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. 386, 390 (1798) (Chase, J.). Indeed, in *Miller v. Florida*, 482 U.S. 423 (1987), this Court unanimously held that retroactive application of State Sentencing Guidelines (enacted in a fashion structurally similar to the United States Sentencing Guidelines) violated the *Ex Post Facto* Clause applicable to the States.

Prior to *United States v. Booker*, 53 U.S. 220 (2005), the circuits had unanimously agreed that the *Ex Post Facto* Clause precluded retroactive application of Guidelines that were more stringent than those in effect when the defendant committed the offense. The circuits, however, divided on the issue of whether the *Ex Post Facto* Clause precludes application of the one-book rule in U.S.S.G. § 1B1.11 to enhance a defendant's sentence for particular offenses occurring before the enactment of a Guidelines enhancement. Following *Booker*, the circuits became

firmly divided on the former proposition, and the circuit split on the latter has not dissipated.

In compliance with *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007), the district court here increased petitioner's offense level for fraud by a total of three levels based on Guidelines not in effect when petitioner engaged in the fraud scheme. In *United States v. Turner*, 548 F.3d 1094 (D.C. Cir. 2008), the D.C. Circuit definitively rejected *Demaree*. The Seventh Circuit has since consistently rejected requests to reconsider *Demaree*, including in petitioner's appeal. Pet. App. 8-9.

The circuit split has become more pronounced in the aftermath of *Turner* and *Demaree*. The Fourth and Sixth Circuits recently spurned government appeals in cases in which sentencing courts had applied Guidelines in effect at the time of the offense, as opposed to those in effect at sentencing. *United States v. Lanham*, 617 F.3d 873 (6th Cir. 2010); *United States v. Lewis*, 606 F.3d 193 (4th Cir. 2010). The Second Circuit also recently rejected *Demaree*, *United States v. Ortiz*, ___ F.3d ___, 2010 WL 3419898 (2d Cir. 2010), and issued a decision on the one-book rule, *United States v. Kumar*, 617 F.3d 612 (2d Cir. 2010).

I. The Circuits Have Become Deeply Divided On Whether The *Ex Post Facto* Clause Precludes Retroactive Application Of Disadvantageous Sentencing Guidelines

A. While the Seventh Circuit has held that the *Ex Post Facto* Clause categorically is not implicated at a Post-*Booker* sentencing, the D.C., Second, Third, Fourth and Sixth Circuits have ruled otherwise

Prior to *United States v. Booker*, 543 U.S. 220 (2005), the courts of appeal had agreed that the *Ex Post Facto* Clause precluded a sentencing court from using the Guidelines in effect on the date of sentencing if those Guidelines called for a higher sentence than those in effect when the defendant committed the offense. See, *e.g.*, *United States v. Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994); *United States v. Schnell*, 982 F.2d 216, 218 (7th Cir. 1992) (collecting cases). This unified approach initially continued to apply post-*Booker*, including in the Seventh Circuit. See, *e.g.*, *United States v. Baretz*, 411 F.3d 867, 873-77 (7th Cir. 2005). *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007), changed that.

1. ***Seventh Circuit*** In *Demaree*, the district court applied the Guidelines in effect on the date of sentencing, but stated that it would have imposed a lower sentence, if it could have used the Guidelines in effect when the offense was committed. The appeal raised the question of *Booker's* effect when a

Guidelines revision renders the sentencing range disadvantageous to a defendant as compared to the Guidelines in effect when the crime was committed. The government conceded that the defendant should have been sentenced under the earlier version of the Guidelines. The Seventh Circuit refused to accept the concession, and ruled that the Guidelines in effect on the date of sentencing should be used in sentencing even if they were more disadvantageous than those in effect at the time of the offense.

Speaking through Judge Posner, the Seventh Circuit acknowledged that Congress could not evade *ex post facto* prohibitions "by delegating penal authority to an agency." *Demaree*, 459 F.3d at 793. In view of *Miller v. Florida*, 482 U.S. 423 (1987), the Seventh Circuit noted that, pre- and post-*Booker*, the courts of appeal had held that "changes in the [Federal] guidelines could not be applied to defendants who had committed their crimes before the changes if the changes would increase the sentence." *Id.* at 793. Citing this Court's *ex post facto* decisions, the court acceded:

> Any of these formulas, *interpreted literally*, would encompass a change in even voluntary sentencing guidelines, for official guidelines even if purely advisory are bound to influence judges' sentencing decisions. Most federal sentences, as the parties note, continue after *Booker* to be within the guidelines' sentencing ranges.

Id. at 794 (emphasis added).

Despite this statement, the Seventh Circuit refused to accept the government's concession of an *ex post facto* violation on grounds that "it is a disservice to courts to interpret their verbal formulas without reference to context." *Id.* The court of appeals reasoned that this Court's decision in *Miller* was distinguishable because district courts were not required to presume the Guidelines sentence, and had "unfettered discretion," subject to "light" appellate review, to impose a sentence outside the Guidelines range. *Id.* at 795. According to the Seventh Circuit, the retroactive application of disadvantageous Guidelines in the long run would only have "a purely semantic effect" since a sentencing court could look to a revised Guideline as a reason to impose a higher sentence. *Id.* The court concluded "that the *ex post facto* clause should apply only to laws and regulations that bind rather than advise, a principle well established with reference to parole guidelines whose retroactive application is challenged under the *ex post facto* clause." *Id.*

After *Demaree*, Seventh Circuit defendants, including petitioner here, have continued to advance *ex post facto* sentencing claims. See *United States v. Panice*, 598 F.3d 426, 435 (7th Cir. 2010); *United States v. Nurek*, 578 F.3d 618, 625-26 (7th Cir. 2009), cert. denied, 130 S.Ct. 2093 (April 19, 2010); *United States v. Patterson*, 576 F.3d 431 (7th Cir. 2009), cert. denied, 130 S.Ct. 1284 (January 25, 2010); *United States v. Hensley*, 574 F.3d 384 (7th Cir. 2009), cert. denied, 130 S.Ct. 1284 (January 25, 2010); *United*

States v. Hill, 563 F.3d 572 (7th Cir. 2009), cert. denied, 130 S.Ct. 623 (November 16, 2009). The Seventh Circuit has consistently refused to reconsider *Demaree*. As stated by the Seventh Circuit in this case: "In *Demaree*, we held that, because the Guidelines are only advisory in nature, a court's use of a later version does not offend *ex post facto* . . . We find no reason to abandon that conclusion today." Pet. App. 9.

2. ***Third Circuit*** In *United States v. Wood*, 486 F.3d 781, 789-91 (3d Cir. 2007), the government conceded that the plain error test had been satisfied where the district court had applied a post-*Booker* Guidelines enhancement not in effect at the time of the offense. Unlike the Seventh Circuit, the Third Circuit accepted the government's concession and remanded for resentencing. The *Wood* opinion did not cite or discuss *Demaree*.[2]

3. ***D.C. Circuit*** The D.C. Circuit expressly rejected *Demaree* in *United States v. Turner*, 548 F.3d 1094 (D.C. Cir. 2008). When the *Turner* defendant committed his offense in 2001, the Guidelines base offense level was 10, carrying a sentencing range of 21 to 27 months imprisonment. By 2006, the base offense level had increased to 14, and the sentencing range to 33 to 41 months imprisonment. *Id.* at 1096.

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[2] Subsequent Third Circuit cases have cited *Wood* for the proposition that the *Ex Post Facto* Clause precludes retroactive application of harsher Guidelines. See *United States v. Jennings*, 358 Fed.Appx. 367, 367 n. 1 (3d Cir. 2009) (*per curiam*); *United States v. Black*, 338 Fed.Appx. 235, 237 (3d Cir. 2009).

The district court applied the Guidelines in effect on the date of sentencing (2006), and imposed a 33-month prison sentence.

Because the Guidelines still serve as an "anchor" and starting point, the D.C. Circuit reasoned that a Guidelines version decision significantly affects sentence severity, thereby implicating the *Ex Post Facto* Clause. *Id.* at 1099-1100. Because use of the later Guidelines created a substantial risk of a higher sentence, the court ruled that the *Ex Post Facto* Clause had been violated. *Id.* at 1100. Rejecting the notion that *Booker* required a different result, the court observed that, as a practical matter, the appellate presumption discussed in *Rita v. United States*, 551 U.S. 338, 351 (2007), prompted judges to impose sentences within the Guidelines range. *Id.* at 1099. Citing Sentencing Commission statistics, the court also noted that "most federal sentences fall within Guidelines ranges even after *Booker*," and that the "impact of *Booker*" on judges' deviation from the Guidelines has been "minor." *Id.*

4. ***Fourth Circuit*** As noted, the Department of Justice conceded *ex post facto* sentencing errors in *Demaree* and *Wood*. The Department thereafter changed course. In August 2008, the Solicitor General instructed the government to assert that the *Ex Post Facto* Clause did not impede application of Guidelines in effect on the date of sentencing, even if the Guidelines in effect at the time of the offense produced a lower sentencing range. See *Hensley v. United States*, No. 09-480, Brief in Opposition to Certiorari 15

(U.S.). In accordance with its revised position, the government appealed a case in the Fourth Circuit in which the district court had applied Guidelines in effect at the time of the offense, rather than more stringent Guidelines in effect on the date of sentencing. See *United States v. Lewis*, 603 F.Supp. 2d 874 (E.D. Va. 2009).

The Fourth Circuit joined the D.C. Circuit "in concluding . . . that the retroactive application of severity-enhancing Guidelines amendments contravenes the Ex Post Facto Clause." *United States v. Lewis,* 606 F.3d 193, 199 (4th Cir. 2010). The court concluded that the correct *ex post facto* test is whether, "practically speaking," the revised Guidelines "created a significant risk of increased punishment for Lewis." *Id.* at 200. The court disagreed with the government's argument that a sentencing court's post-*Booker* discretion obviated *ex post facto* concerns since a sentencing court still must "begin all sentencing proceedings by correctly calculating the applicable Guidelines range," *Id.* at 200 (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)), and its failure to do so constitutes error. The standard of review applicable to sentencing claims, and the district court's obligation to provide sufficiently compelling reasons for variances from the Guidelines, buttressed this determination. The court further looked to statistics to "emphasize the practical effect of the advisory Guidelines" on sentencing decisions. *Id.* at 201-02. In this regard, the court pointed out that 81.9 percent of sentences in the Fourth Circuit during fiscal year 2009 fell within the advisory Guidelines range or a

government-sponsored departure, and found this "undercut the Government's characterization" of the Guidelines as "merely providing helpful advice." *Id.* at 202.

The Fourth Circuit was also "unconvinced by the Seventh Circuit's contrary reasoning in *Demaree*." *Id.* "On the contrary, we are more persuaded by the D.C. Circuit's description of the Guidelines as an important 'anchor' for a sentencing judge," said the *Lewis* court. *Id.* The court criticized *Demaree* for taking "an overly narrow view of the scope of the Ex Post Facto Clause." *Id.* In addition, the Fourth Circuit took issue with the Seventh Circuit's description of the sentencing and appellate processes.

The Fourth Circuit held that a defendant is not required to "show definitively" that he would have received a higher sentence if the court had used later Guidelines. *Id.* at 203. Rather, the appropriate analysis is whether the application of the revised Guidelines poses a "significant risk" of an increased sentence. *Id.* Finding Lewis had made the required showing, the court of appeals refused to overturn the district court's use of earlier, more advantageous Guidelines.

In *Lewis*, Chief District Judge Goodwin, sitting by designation, dissented on the *ex post facto* issue. The government filed a petition for rehearing *en banc,* which was denied on July 26, 2010. *United States v. Lewis*, Nos. 09-4343, 09-4474, Docket Entry # 53 (4th Cir.). The government did not petition for certiorari in *Lewis*.

5. ***Sixth Circuit*** *United States v. Lanham*, 617 F.3d 873 (6th Cir. 2010), brought another government sentencing appeal. The *Lanham* defendants committed their offenses in 2003 when the 2002 Guidelines were in effect. *Id.* at 889. The 2008 Guidelines in effect at sentencing resulted in a higher base offense level. On appeal, the government maintained that use of the 2008 Guidelines would not have violated the *Ex Post Facto* Clause. The government argued that *Booker* had derailed *Miller v. Florida*, 482 U.S. 423 (1987), as well as earlier circuit precedent finding that *ex post facto* principles precluded retroactive application of more onerous Guidelines. The Sixth Circuit rejected this argument. It found that the presence of discretion "does not displace the protections of the Ex Post Facto Clause." 617 F.3d at 889 (citations omitted). The court of appeals emphasized that "[t]he Sentencing Guidelines are still relevant and are a starting point for determining a defendant's sentence. . . . As a result, the advisory nature of the Guidelines does not completely eliminate Ex Post Facto concerns." *Id.* at 889-90.

On October 7, 2010, the government filed a petition for *en banc* rehearing. *United States v. Lanham*, Nos. 08-6504, 08-6506, 09-5094, 09-5095, Document 006110754186 (6th Cir.). As of the date this petition went to press, the Sixth Circuit has not taken any action on the government's rehearing petition.

6. ***Second Circuit*** Prior to *United States v. Ortiz*, ___ F.3d ___, 2010 WL 3419898 (2d Cir. 2010), the post-*Booker ex post facto* sentencing issue had been an open question in the Second Circuit. See *United States v. Kumar*, 617 F.3d 612, 642 (2d Cir.

2010) (Sack, J., concurring and dissenting). In *Ortiz*, the Second Circuit addressed "whether, and under what circumstances, a more onerous guideline, issued by the United States Sentencing Commission after the date of an offense, renders a sentence imposed under the advisory Guidelines regime in violation of the *Ex Post Facto* Clause." 2010 WL 3419898, *1. After surveying the circuit split, the Second Circuit rejected the Seventh Circuit's categorical rejection of post-*Booker ex post facto* sentencing claims. *Id.* at *4. Instead, the Second Circuit adopted the "substantial risk" approach employed by the D.C. Circuit in *Turner*. *Id.* The Second Circuit found that this test remained "faithful to Supreme Court jurisprudence explaining that the Clause protects against a post-offense change that 'create[s] a significant risk of increas[ing] [the] punishment.'" *Id.* (quoting *Garner v. Jones*, 529 U.S. 244, 255 (2000)).[3]

B. The First, Fifth, Eighth, Ninth and Tenth Circuits have voiced opinions on the issue in *dicta*

Other circuits have discussed in *dicta* whether the *Ex Post Facto* Clause precludes retroactive application

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[3] The *Ortiz* court determined the defendant was not entitled to remand since the district court had imposed a sentence below the unamended Guidelines range. In *United States v. Faison*, 2010 WL 3548847 (2d Cir. 2010), the Second Circuit vacated and remanded a sentence for consideration of an *ex post facto* point in view of *Ortiz*.

of disadvantageous, revised Guidelines in the wake of *United States v. Booker*, 543 U.S. 220 (2005). The First, Eighth, Ninth and Tenth Circuits have suggested or assumed that the *Ex Post Facto* Clause is implicated in a post-*Booker* sentencing proceeding. Only the Fifth Circuit has intimated otherwise.

1. ***First Circuit*** In *United States v. Gilman*, 478 F.3d 440, 449 (1st Cir. 2007), the court stated in *dicta* that the holding in *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007), was "doubtful in this circuit." More recently, the First Circuit declared that it "expect[s] that the Ex Post Facto Clause requires application of the older Guidelines if those would be more lenient." *United States v. Jaca-Nazario*, 521 F.3d 50, 56 (1st Cir. 2008).

2. ***Eighth Circuit*** In *United States v. Anderson*, 570 F.3d 1025, 1034 n. 7 (8th Cir. 2009), the court assumed, without deciding, that the *Ex Post Facto* Clause applies to Guidelines determinations post-*Booker*. In *United States v. Carter*, 490 F.3d 641, 645-46 (8th Cir. 2006), the court suggested in *dicta* that, after *Booker*, "retrospective application of the Guidelines implicates the *ex post facto* clause."

In *United States v. Deegan*, 605 F.3d 625, 631-32 (8th Cir. 2010), the district court used Guidelines in effect when the crime was committed. At sentencing, the district court mentioned later Guidelines that would have almost doubled the sentencing range. On appeal, the defendant submitted that the district

court had erred in mentioning (but not applying) later Guidelines. The Eighth Circuit acknowledged the dichotomy between *Demaree* and *Turner*, and deemed the role of the *Ex Post Facto* Clause post-*Booker* "an open question in this circuit." *Id.* at 632. With respect to defendant's appellate objection, the *Deegan* court found that defendant had not so objected at sentencing, and saw "no obvious error in the court's consideration of [the] information" contained in the later Guidelines. 605 F.3d at 632.

3. ***Ninth Circuit*** The Ninth Circuit has suggested that the advisory Guidelines implicate the *Ex Post Facto* Clause. In *United States v. Stevens*, 462 F.3d 1169, 1172 (9th Cir. 2006), the court vacated and remanded a sentence that had been calculated by reference to a substantive Guidelines amendment that had not been in effect when the defendant committed the offense. The court in *United States v. Rising Sun*, 522 F.3d 989, 993 n. 1 (9th Cir. 2008), stated in *dicta* that the district court had correctly determined that the *Ex Post Facto* Clause would be implicated by retrospective application of Guidelines that were more onerous than those in effect at the time of the offense.

4. ***Tenth Circuit*** In *United States v. Thompson*, 518 F.3d 832 (10th Cir.), cert. denied, 129 S.Ct. 487 (2008), the court addressed a post-*Booker ex post facto* sentencing claim under the plain error standard of review. The court ruled that the defendant had not shown district court error in Guidelines selection. Quoting pre-*Booker* precedent, the court stated,

"the *ex post facto* clause 'bars the sentencing court from retroactively applying an amended guideline provision when that amendment disadvantages the defendant.'" *Id.* at 869-70 (citation omitted).

5. ***Fifth Circuit*** In *United States v. Castillo-Estevez*, 597 F.3d 238 (5th Cir. 2010), the defendant contended that the application of 2008, as opposed to 2007, Guidelines violated the *Ex Post Facto* Clause. The Fifth Circuit reviewed the point for plain error. *Id.* at 240. While the Fifth Circuit had held (pre-*Booker*) that retrospective application of disadvantageous Guidelines violates the *Ex Post Facto* Clause, *United States v. Suarez*, 911 F.2d 1016, 1021 (5th Cir. 1990), the court commented that the defendant's argument overlooked that *Booker* had rendered the Guidelines advisory. *Castillo-Estevez*, 597 F.3d at 240. The court acknowledged the circuit conflict, and cited Chief Judge Jones' concurring opinion in *United States v. Rodarte-Vasquez*, 488 F.3d 316 (5th Cir. 2007), which had embraced *Demaree*. The *Castillo-Estevez* court, however, did not determine "whether *ex post facto* claims arising from the application of evolving sentencing guidelines are viable after *Booker*," 597 F.3d at 241, since the alleged error did not rise to the level of plain error. Cf. *United States v. Austin*, 479 F.3d 363 (5th Cir. 2007) (acknowledging in *dicta* that retrospective application of disadvantageous Guidelines might pose *ex post facto* problems).

C. The Seventh Circuit has wrongly construed this Court's *ex post facto* jurisprudence

The Seventh Circuit's position cannot be reconciled with *Miller v. Florida*, 482 U.S. 423 (1987), which unanimously found that retroactive application of disadvantageous Sentencing Guidelines violated the *Ex Post Facto* Clause applicable to the States. It is true the *Miller* Court described Florida's Guidelines as decreeing a "presumptive" sentencing range, and *Rita v. United States*, 551 U.S. 338, 354-55 (2007), determined that a federal sentencing court should not presume a sentence within the Guidelines range to be correct. But this Court's *ex post facto* jurisprudence is clear: substance prevails over form. *Collins v. Youngblood*, 497 U.S. 37, 46 (1990) (attaching a "procedural" label to a law does not exempt the law from *ex post facto* scrutiny since "[s]ubtle *ex post facto* violations are no more permissible than overt ones"); *Cummings v. Missouri*, 71 U.S. 277, 325 (1867) ("the Constitution deals with substance, not shadows . . . "); see also *Stogner v. California,* 539 U.S. 607, 616 (2003). Even after *United States v. Booker*, 543 U.S. 220 (2005), the Guidelines carry weight at sentencing; a sentencing judge cannot altogether ignore them, and must start the process by correctly calculating the Guidelines. *Gall v. United States*, 552 U.S. 38, 49 (2007).

The Seventh Circuit relied upon the sentencing judge's "unfettered" discretion as a reason for refusing to dub the Guidelines "binding" laws subject to

ex post facto restraints. *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007). *Garner v. Jones*, 529 U.S. 244, 255 (2000), however, makes clear that the presence of discretion does not displace an *ex post facto* objection. This Court's most recent *ex post facto* cases also evidence that the correct test – one that has not been applied by the Seventh Circuit – is whether there is a "substantial risk" that retroactive application of a penal law will increase punishment. *Id.* at 250-52, 255; *California Department of Corrections v. Morales*, 514 U.S. 499, 509 (1995). Critical for *ex post facto* purposes is the practical consequence of retroactive application of a law. *Garner*, 529 U.S. at 255.

Petitioner has satisfied this Court's formulation. In practice, the Guidelines produce an "anchor" likely to influence the actual sentence. *United States v. Lewis,* 606 F.3d 193, 202 (4th Cir. 2010); *United States v. Turner*, 548 F.3d 1094, 1099-1100 (D.C. Cir. 2008). That was the case here: the district court imposed a sentence within the range dictated by higher Guidelines in effect on the date of sentencing, and steadfastly refused to be guided by a lower Guidelines range in effect at the time of the fraud offenses. Practically speaking, the district court increased petitioner's sentence through use of Guidelines not in effect when petitioner committed the fraud offenses. Contrary to the Seventh Circuit's position, retroactive application of an altered "substantive 'formula' used to calculate the applicable sentencing range" violates the *Ex Post Facto* Clause.

Morales, 514 U.S. at 505; see also *Lynce v. Mathis*, 519 U.S. 433, 446-47 (1997) (retroactive application of good time cancellation statute "unquestionably disadvantaged petitioner [and] . . . prolonged his imprisonment"); *Miller*, 482 U.S. at 432-33 ("[p]etitioner . . . was 'substantially disadvantaged' by the retrospective application of the revised guidelines to his crime").[4]

In *Garner*, this Court stated that the "general operation" of an amended law could substantially risk increased punishment. 529 U.S. at 255. As petitioner demonstrated below, that was the case here. The United States Sentencing Commission's *Final Report on Impact of* United States v. Booker showed that most sentences were within the Guidelines range

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[4] The *Demaree* court also resisted applying the *Ex Post Facto* Clause to post-*Booker* sentencings on "semantic" grounds. 459 F.3d at 795. That is, a judge who desires to apply a sentence within a new, more stringent Guidelines range could say she used the new Guideline information to pick a sentence consistent with 18 U.S.C. § 3553(a). The D.C. Circuit has rejected this rationale. *Turner*, 549 F.3d at 1099 ("we reject the idea that district judges will misrepresent the true basis for their actions").

It is also ironic that the Seventh Circuit deemed "unattractive" the government's quest to commit judges to the Guidelines by conceding the *ex post facto* violation. *Demaree*, 459 F.3d at 795. "This produces the paradox that while the ex post facto clause is intended to protect criminal defendants, it is here invoked by the government in the hope that it will lead to longer sentences." *Id.* But that *is* the effect of *Demaree*. As exemplified by this case, more stringent Guidelines in effect on the date of sentencing yielded a longer sentence than would have been imposed if the Guidelines in effect at the time of the fraud offenses had been used.

after *United States v. Booker*, 543 U.S. 220 (2005). See *United States v. Custable*, No. 09-2593, Deft's Brief 41 (7th Cir.). Other data confirmed that sentences under the Guidelines range were in the minority on a national basis. See *Custable*, *supra* 41-42 (citing United States Sentencing Commission, Post *Kimbrough/Gall* Data Report, Table 1 (2009) (reporting below Guidelines sentences based purely on § 3553(a) factors in 6.5% cases post-*Booker*, and in 9.4% cases following *Kimbrough v. United States*, 552 U.S. 85 (2007), and *Gall v. United States*, 552 U.S. 38 (2007)). Petitioner also pointed out that below-Guidelines sentencing in the Seventh Circuit based purely on § 3553(a) factors had occurred in 8.9% cases post-*Booker*, and in 16.1% cases post-*Kimbrough/Gall*). *Custable*, *supra* 41 n. 9 (citing Post *Kimbrough/Gall* Data Report, Table 1-7).[5]

The Seventh Circuit also relied on "light" appellate review of post-*Booker* sentences to justify its position. See *Demaree*, 495 F.3d at 795. The Seventh Circuit, however, subsequently clarified that

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[5] According to data released by the Sentencing Commission following the filing of petitioner's Seventh Circuit brief, this trend has not abated. The majority of sentences (on a national basis) imposed during the second and third quarters of 2009 were within the Guidelines range or consistent with a government sponsored departure motion. See http://ussc.gov/sc_cases/USSC_2008_Quarter_Report_2nd.pdf; http://www.ussc.gov/sc_cases/USSC_2008_Quarter_Report_3rd.pdf. Below-Guidelines sentences for non-government sponsored reasons occurred in 13.1% of sentencings in the third quarter of 2008, and in 12.7% of the sentencings in the second quarter of 2008. *Id.*

sentencing review "is now to be *robust*, albeit deferential." *United States v. Aguilar-Huerta*, 576 F.3d 365, 367 (7th Cir. 2009) (emphasis added). Not only must the judge start the sentencing process by correctly calculating the Guidelines, but Guidelines calculations are subject to "plenary" appellate review. See *United States v. Vrdolyak*, 593 F.3d 676, 683 (7th Cir. 2010) (citing *Gall*, 552 U.S. at 51). As the D.C. Circuit correctly perceived, the appellate review post-*Rita* is more likely to produce sentences within the Guidelines range.[6] *Turner*, 548 F.3d at 1099.

The *Demaree* court also predicated its holding on the relationship between parole guidelines and the *Ex Post Facto* Clause. But this Court has not held that parole guidelines are off-limit to the *Ex Post Facto* Clause. See *Kyle v. Lindsay*, 2007 WL 1450[illegible]2, *3 n. 6 (M.D. Pa. 2007). In fact, *Garner* remanded to give petitioner the opportunity to seek discovery on the issue of whether the practical retroactive implementation of a parole rule significantly risked increased punishment. 529 U.S. at 257.

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[6] As petitioner cited to the Seventh Circuit, few within-Guidelines sentences had been overturned on appeal. See *Custable*, *supra* 41 (citing 2008 Sourcebook, Table 57 (reporting a 94.4% affirmance rate on a national basis in cases in which defendants appealed a sentence based on § 3553(a) factors during fiscal year 2008); 2007 Sourcebook, Table 57 (reporting a 96.9% affirmance rate on a national basis in cases in which defendants appealed a sentence based on § 3553(a) factors during fiscal year 2007). On the other hand, "[w]hen the government appeals, below guidelines sentences on § 3553(a) grounds are reversed more often than not." *Custable*, *supra* 41.

Garner also held that an agency's policies are relevant to the *ex post facto* analysis, and faulted the court of appeals for not considering a parole board's internal policy statement. *Id.* at 256. "At a minimum, policy statements, along with the Board's actual practices, provide important instruction" on the issue of whether the significant risk test has been met. *Id.* Here, a Guidelines policy statement expressly contemplates *Ex Post Facto* Clause relevance. See U.S.S.G. § 1B1.11(b)(1). The Seventh Circuit has not squarely addressed this policy statement, or explained its non-pertinence in a post-*Booker* sentencing.

Finally, it is no answer to say that 18 U.S.C. § 3553(a)(4)(A)(ii) requires a court to apply the Guidelines in effect on the date of sentencing. First, this statute was enacted before this Court's decision in *Miller*. Second, § 3553(a)(5)(B) expressly requires the court to apply relevant Sentencing Commission policy statements in effect on the date of sentencing. By its policy statement in § 1B1.11, the Sentencing Commission clearly envisions that the *Ex Post Facto* Clause may be implicated at sentencing.

D. This Court's review is warranted because the constitutional question presented recurs often and cannot be resolved by the Sentencing Commission

The question presented herein frequently recurs. This much is evident from the discussion above. See also *Hensley v. United States*, No. 09-480, Petition for Certiorari 20-22 n. 8 (U.S.) (citing over 55 cases in which the *ex post facto* sentencing issue had arisen since *Booker*). Nearly every circuit has either issued a ruling, or voiced an opinion in *dicta* on the question of whether, following *United States v. Booker*, 543 U.S. 220 (2005), a sentencing judge should calculate Guidelines on the basis of those in effect at sentencing if they produce a higher advisory sentencing range than the ones in effect when the defendant committed the offense.[7]

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[7] The importance of the issue is also evident from legal and scholarly commentary. See D. Berman, *Sentencing Law and Policy Blog* (December 5, 2008, April 17, 2009, March 12, 2010, May 27, 2010 and August 24, 2010), available at http://sentencing.typepad.com; J. Dillon, *Doubting Demaree*, 110 W. Va. L. Rev. 1033 (2008); M. Hosken, *Ex Post Facto Protection Remains in a Post-*Booker *Sentencing World*, N.Y. Crim. Defense (August 28, 2010), available at http://newyorkcriminaldefense.blogspot.com/2010/08/ex-post-facto-protection-remains-in.html; D. Levy, *Defending Demaree: The Ex Post Facto Clause's Lack of Control Over the Federal Sentencing Guidelines After* Booker, 77 Fordham L. Rev. 2623 (2009); *Ex-Post-*Booker*: Retroactive Application of Federal Sentencing Guidelines*, 83 Chi. Kent L. Rev. 395 (2008).

Given that Congress regularly proposes *upward* revisions to the Guidelines, see U.S.S.G., App. C (2010), the issue will continue to arise. It is in the interest of fair sentencing policy for a single national standard to be employed. Until this Court ends the circuit split, courts will answer the question presented herein differently depending on the sentencing court's geographic location. Defendants in the Seventh Circuit, and likely the Fifth Circuit, will have their Guidelines calculated through use of the Guidelines in effect on the day of sentencing – even if Guidelines in effect when the crimes were committed yield a lower sentencing range. Similarly situated defendants in other circuits will or likely will have their Guidelines computed on the basis of the Guidelines in effect at the time of the offense.

This is not a problem the Sentencing Commission can resolve. Since 1992, U.S.S.G. § 1B1.11(b)(1) has been in effect. This policy statement requires a sentencing court to apply a single Guidelines Manual in effect on the date of sentencing unless the "court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution." The Sentencing Commission has not revised this policy statement in any of the annual amendments submitted to Congress following *Booker*, or *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007). While the Sentencing Commission may take a side in a circuit split, it lacks authority to overrule a court of

appeals decision. See 28 U.S.C. § 994 (setting forth Sentencing Commission's duties). By its continued commitment to § 1B1.11(b)(1), the Sentencing Commission recognizes that the *Ex Post Facto* Clause retains viability post-*Booker*.

E. The time has come for this Court to resolve the circuit split

In *Hensley*, a Seventh Circuit defendant applied for certiorari on grounds that a higher sentencing range had been retroactively applied in his case. *Hensley v. United States*, No. 09-480 (U.S.). In a response to this certiorari petition filed in October 2009, the Solicitor General acknowledged the split between *Demaree* and *Turner*, but took the position that the "conflict does not currently warrant intervention by this Court." *Hensley*, *supra*, U.S. Brief In Opposition 9. The government portended future review of the question:

> If the conflict between the Seventh and D.C. Circuits persists, the issue may eventually warrant this Court's resolution in an appropriate case. But until the D.C. Circuit has an opportunity to revisit its views, in light of both this Court's recent decisions and the changed position of the United States, the conflict does not warrant the Court's review.

Id. at 15.

This Court denied certiorari in *Hensley*, 130 S.Ct. 1284, as well as in other cases raising the *ex post*

facto question presented herein. *Hensley*, *supra*, U.S. Brief In Opposition 9 (citing cases); *supra*, 14. Since those cases, the circuit division has matured. Given the recent decisions of the Second, Fourth and Sixth Circuits, the dispute is now more than just between the Seventh and D.C. Circuits. Because of the recent emergence of a clear circuit conflict, and the entrenchment of *Demaree* in the Seventh Circuit, the case for this Court's review is much stronger now than it was earlier.

Because liberty is implicated at sentencing, the issue presented here is obviously important. It is unfair that defendants, say, in Chicago, Milwaukee or Indianapolis receive longer prison sentences than similarly situated defendants in Washington, D.C., Richmond or Detroit. If Congress' goal of eliminating sentencing disparity on a national basis, 18 U.S.C. § 3553(a)(6), 28 U.S.C. § 991(b)(1)(B), U.S.S.G. § 1A1.1, Application Note, and *Booker*, 543 U.S. at 264, means anything, then the length of a prison sentence should not be substantially affected by the geographic location of the sentencing court.

II. The Circuits Are Also Divided On The Question Of Whether Application Of The "One-Book" Rule May Violate The *Ex Post Facto* Clause

Both before and after *United States v. Booker*, 543 U.S. 220 (2005), the circuits have decisively split on an additional *ex post facto* Guidelines issue:

whether application of the one-book rule in U.S.S.G. § 1B1.11(b)(2) and (3) violates "the *Ex Post Facto* clause when applied to the sentencing of offenses committed both before and after the publication of the Guidelines." *United States v. Kumar*, 617 F.3d 612, 628 (2d Cir. 2010). In the Seventh Circuit, *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007), obviously subsumes a negative answer to this question. In addition, in *United States v. Vivit,* 214 F.3d 908, 919 (7th Cir. 2000), the Seventh Circuit rejected the argument that the *Ex Post Facto* Clause could vitiate the one-book rule.[8]

The issue is illustrated by the Second Circuit's recent 2-1 ruling in *Kumar*. There, the defendants participated in a fraud scheme that ended in 2000. In August and September 2003, the defendants committed obstruction of justice by making false statements about the fraud to prosecutors and the SEC. Defendants pled guilty. At sentencing, the district court applied the 2005 Guidelines, which resulted in a substantial disadvantage since Guidelines in effect at the time of the fraud produced a much lower sentencing range.

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[8] A concurring opinion in *Vivit* theorized that the "gymnastics" performed by the majority were unnecessary because the Guidelines were not "laws" subject to *ex post facto* restraints. 214 F.3d 924 (Easterbrook, J., concurring).

The Second Circuit affirmed. It noted that "[a] majority of circuit courts has held that the one-book rule does not contravene the *Ex Post Facto* clause, 'at least as applied to a series of similar offenses.'" 617 F.3d at 626 (citation omitted). The Second Circuit elucidated that the Fourth, Fifth, Eighth, Tenth and Eleventh Circuits agree with the Seventh Circuit's approach as discussed in *Vivit*. *Id*. Cases on this side of the equation include: *United States v. Sullivan*, 255 F.3d 1256, 1262-63 (10th Cir. 2001); *United States v. Lewis*, 235 F.3d 215, 218 (4th Cir. 2000); *United States v. Kimler*, 167 F.3d 889, 893-95 (5th Cir. 1999); *United States v. Bailey*, 123 F.3d 1381, 1404-05 (11th Cir. 1997); *United States v. Cooper*, 35 F.3d 1248, 1254-55 (8th Cir. 1994), vacated, 514 U.S. 1094 (1995), reinstated, 63 F.3d 761, 762 (8th Cir. 1995) (*per curiam*). "The Third and Ninth circuits, however, have rejected the Commission's position as incompatible with the *Ex Post Facto* clause." 617 F.3d at 626. The cases on this side of the equation are: *United States v. Ortland,* 109 F.3d 539, 547 (9th Cir. 1997); *United States v. Bertoli*, 40 F.3d 1384, 1404 (3d Cir. 1994).

The majority in *Kumar* sided with cases finding no *ex post facto* violation when the one-book rule results in application of a single Guidelines Manual to offenses committed before and after revisions. *Id*. The Second Circuit ruled that an *ex post facto* violation turns on the deprivation of fair notice, as opposed to a right to less punishment. *Id*. (citing *Weaver v. Graham*, 450 U.S. 24, 30 (1981)). The court reasoned

that the one-book rule placed the defendants on notice prior to their commission of obstruction offenses. The court also analogized the one-book to recidivism statutes. *Id.* at 629 (citing *Gryger v. Burke*, 334 U.S. 728 (1948)).

Judge Sack dissented. He discerned "inherent tension between the one-book rule and the *Ex Post Facto* clause." *Id.* at 641-42. Concerning the notice issue, Judge Sack wrote, "it seems to me that the notice that the defendants received here was notice as to punishment for the wrong crime." *Id.* at 643. The revised Guidelines provided "inconsequential notice," according to the dissent, since the defendants were subjected to increased sentencing ranges for already-completed crimes. *Id.*; see also *Sullivan*, 255 F.3d at 1266 (Kelly, J., dissenting). Judge Sack disputed that the one-book rule provided sufficient notice. 617 F.3d at 648 (quoting *Miller v. Florida*, 482 U.S. 423, 431 (1987) ("[t]he constitutional prohibition against *ex post facto* laws cannot be avoided merely by adding to a law notice that it might be changed")). In addition, the dissent found the majority's reliance on recidivism laws unpersuasive since the later crime triggered an "'*additional penalty for . . . earlier crimes.*'" *Id.* at 649 (quoting *Gryger*, 334 U.S. at 732) (emphasis supplied in *Kumar*). Judge Sack further stressed that this Court requires "fair notice," and reasoned that the notice provided to the defendants was not. *Id.* at 648, 650. Judge Sack thus concluded that the retroactive application of revised Guidelines to the defendants' fraud offenses transgressed the

well entrenched prohibition of "inflict[ing] a greater punishment, than the law annexed to the crime, when committed." *Id.* at 650 (citing *Calder v. Bull,* 3 U.S. 386, 390 (1798) (Chase, J.)).

The role of the one-book rule and the *Ex Post Facto* Clause is also at issue in this case. The issue arises in connection with the 6-level enhancement for fraud offenses involving more than 250 victims. U.S.S.G. § 2B1.1(b)(2)(C). There was no dispute that the fraud scheme ended in June 2002. See Pet. App. 9, 16, 29-43. After the fraud scheme ended, the Sentencing Commission passed an emergency amendment, effective January 25, 2003, creating the 6-level enhancement in § 2B1.1(b)(2)(C). (Prior Guidelines had directed a 4-level increase for fraud offenses involving more than 50 victims. U.S.S.G. § 2B1.1(b)(2) (2001).) In March and April 2003, following passage of § 2B1.1(b)(2)(C), petitioner committed obstruction and contempt by violating an asset freeze order entered in a civil case filed by the SEC. Pet. App. 44-45.

Like *Kumar*, this case involves a situation in which the fraud Guidelines were enhanced (insofar as the "more than 250 victims" upward adjustment is concerned) not on the basis of the Guidelines in effect when petitioner committed fraud, but because of later obstruction offenses. (Notably, obstruction Guidelines were not upwardly revised after petitioner's fraud and his sentencing date.) The issue of whether application of the one-book rule violates the

Ex Post Facto Clause in this circumstance has divided lower courts since the onset of the Guidelines. The circuit split discussed above evidences that the issue recurs. It is worthy of this Court's review, and provides this Court with an opportunity to resolve *both* circuit splits regarding the *Ex Post Facto* Clause and the Guidelines.

III. This Case Is An Appropriate Vehicle To Resolve Important *Ex Post Facto* Issues Under The Guidelines

This case is suitable for this Court's review. A central concern of the *Ex Post Facto* Clause is implicated – retroactive application of a penal law that increased punishment. See, *e.g.*, *Johnson v. United States*, 529 U.S. 694, 699 (2000) (describing retroactive application of laws increasing punishment to be the "heart of the *Ex Post Facto* Clause"). There is no question that more onerous Guidelines in effect when petitioner was sentenced (but not when he committed any of the fraud offenses) triggered the aggravated offense level score. In sentencing the petitioner, the district court did not pick the 262-month prison sentence out of "thin air." *United States v. Turner*, 548 F.3d 1094, 1100 (D.C. Cir. 2008). To the contrary, the 262-month prison term was the bottom of the Guidelines range in effect on the date of sentencing. While the district court described the sentencing range as "quite high," Pet. App. 63, it did not deviate downward, or consult earlier Guidelines that would have produced a lower sentencing range. The later, more

stringent Guidelines had the practical effect of increasing the amount of time petitioner must spend in prison. Because the Guidelines in effect when petitioner committed the fraud offenses produced a lower offense level score, petitioner's *ex post facto* claim is neither speculative nor attenuated. Cf. *Lynce v. Mathis*, 519 U.S. 433, 450 (1997) (Thomas, J., concurring); *California Department of Corrections v. Morales*, 514 U.S. 499, 509 (1995).

Petitioner recognizes that the government has filed a petition for rehearing *en banc* in *United States v. Lanham*, 617 F.3d 873 (6th Cir. 2010). If the Sixth Circuit votes to hear that case, certiorari should not be denied in this case. As discussed above, the circuit split is now well entrenched. Because the Seventh Circuit has steadfastly refused to reconsider its position on the relationship between the *Ex Post Facto* Clause and the Guidelines, any further Sixth Circuit review could not cure the circuit split.

If the government ultimately applies for certiorari in *Lanham*, this case presents a better vehicle for review. *Lanham* only raises the issue of whether the *Ex Post Facto* Clause permits retroactive application of Guidelines in effect on the date of sentencing, but not when the offense was committed. *Lanham* did not address the relationship between the *Ex Post Facto* Clause and the one-book rule, U.S.S.G. § 1B1.11(b)(2) and (3). While this case raises the former issue with respect to the fraud base offense level, it also raises a one-book issue in connection with the "more than 250 victims" enhancement, U.S.S.G. § 2B1.1(b)(2)(C),

which was not in effect during the fraud, but was in effect when petitioner violated the asset freeze order. This case thus presents the Court with an opportunity to address both *ex post facto*/Guidelines issues that have been plaguing the lower courts for some time, and to construe § 1B1.11 as a whole.

CONCLUSION

WHEREFORE, based on the foregoing, Petitioner Frank Custable respectfully moves this Honorable Court to grant certiorari, vacate the judgment, remand for reconsideration and/or order any other appropriate relief.

Respectfully submitted,

MARC W. MARTIN*
*Counsel of Record
MARC MARTIN, LTD.
53 West Jackson Blvd.
Suite 1420
Chicago, IL 60604
(312) 408-1111
mwm711@mac.com

JEFFREY B. STEINBACK
53 West Jackson Blvd.
Suite 1442
Chicago, IL 60604
(847) 624-9600

Counsel for Petitioner Frank Custable

615 F.3d 824

United States Court of Appeals,
Seventh Circuit.
UNITED STATES of America,
Plaintiff-Appellee,
v.
Christine FAVARA and Frank Custable, Jr.,
Defendants-Appellants.
Nos. 09-2589, 09-2593.

Argued Feb. 23, 2010.
Decided Aug. 11, 2010.

John F. Podliska (argued), Office of the United States Attorney, Chicago, IL, for Plaintiff-Appellee.

John J. Muldoon (argued), Muldoon & Muldoon, Chicago, IL, for Defendant-Appellant Christine Favara.

Marc W. Martin (argued), Marc Martin, Ltd., Chicago, IL, and Jeffrey B. Steinback, Law Office of Jeffrey B. Steinback, Chicago, IL, for Defendant-Appellant Frank Custable, Jr.

Before BAUER, POSNER and SYKES, Circuit Judges.

BAUER, Circuit Judge.

Christine Favara and Frank Custable were convicted of fraudulently acquiring and selling corporate securities. The district court sentenced Favara to 70 months in prison and Custable, the organizer of the scheme, to 262 months in prison. They appeal their sentences as unreasonable. For the reasons stated below, we affirm.

I. BACKGROUND

A. Frank Custable

In June 2008, Custable pleaded guilty to seventeen counts of wire and securities fraud for a scheme in which he fraudulently obtained restricted shares of stock in failing companies, concealed the transactions from the SEC, and then disseminated false information to create a market for the shares.

In addition to the fraud charges, Custable pleaded guilty to obstruction of justice and contempt of court, stemming from his conduct during the SEC's investigation of the stock scheme and its ensuing civil suit against him. One of the obstruction counts charged Custable and his attorney, Frank Luce, with an attempt to thwart the investigation by falsely telling the SEC that Luce represented one of Custable's former employees and that the employee would not cooperate with the agency's investigation. The contempt count and the second obstruction count reflected Custable's transfer and expenditure of assets that had been frozen during the SEC civil suit, in contravention of a federal court order.

After he pleaded guilty, the court sentenced Custable to 262 months in prison, within the recommended Guideline range. On appeal, Custable argues that the district court miscalculated his offense level, enhanced his sentence twice for his violation of the asset freeze order, improperly used a later version of the Guidelines, and imposed an unreasonably harsh

sentence. Only the last three arguments were made in the district court.

B. Christine Favara

Favara was an executive who worked with Custable to facilitate the stock transactions and falsify consulting contracts and SEC registration documents. In 2008, she pleaded guilty to a single count of securities fraud.

Before her guilty plea, and while free on bond in this case, Favara posed as an investment advisor and stole at least $155,000 in retirement funds from a client. She was again indicted for fraud, this time in the Eastern District of California, and her bond in this case was revoked. When Favara agreed to plead guilty, the government dismissed the California indictment.

At sentencing, the court acknowledged Favara's difficult childhood, her bipolar disorder and other arguments for a lenient sentence. But it held that the seriousness of the offenses warranted a sentence within the Guideline range and sentenced Favara to 70 months in prison, at the low end of the recommended range.

Favara timely appealed. She argues that the judge failed to adequately consider the advisory nature of the Guidelines and her arguments for a lenient sentence.

II. DISCUSSION

In this appeal, the parties ask us to evaluate the fairness of the district court's sentencing procedures and the overall reasonableness of their sentences. We review the district court's imposition of within-Guidelines sentences for abuse of discretion. *United States v. Poetz,* 582 F.3d 835, 837 (7th Cir.2009). We review de novo the procedures used during sentencing, including the court's consideration of the factors in 18 U.S.C. § 3553. *Id.*

A. Custable

Custable provides four reasons why his sentence is unreasonable. First, he complains that the presentence investigation report ("PSR") overstated his offense level, which should have been six, and not seven. And so he asks us to remand so the district court can resentence him under the new, lower offense level.

We typically review de novo the district court's sentencing procedures. *United States v. Garrett,* 528 F.3d 525, 527 (7th Cir.2008). Custable never objected in the district court to the base offense level, so we deem his arguments forfeited and review for plain error. *Id. See also United States v. Jaimes-Jaimes,* 406 F.3d 845, 848-49 (7th Cir.2005). On plain error review, we first determine whether there was error, whether it was plain, and whether it affected substantial rights. *Garrett,* 528 F.3d at 527. If these criteria are met, we then have discretion to grant

relief if the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *United States v. Sawyer,* 521 F.3d 792, 796 (7th Cir.2008) (quoting *United States v. Olano,* 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)). Even if we were to remand Custable's case with instructions to reduce his base offense level, there is no reason to believe a correction would affect the sentence, so any error is harmless. *See Garrett,* 528 F.3d at 527.

The PSR broke the counts against Custable into two groups, one composed of the fraud and contempt counts and the other containing the two obstruction counts. When a defendant is sentenced for more than one group of counts, the Guidelines prescribe the method whereby a court determines the "combined offense level" for the groups, with the goal of using the most serious offense as the starting point and "provid[ing] incremental punishment for significant additional criminal conduct." U.S. Sentencing Guidelines Manual ch. 3, pt. D, introductory cmt. Under these rules, when two groups of counts are both sufficiently serious such that the offense level for one group is only "5 to 8 levels less serious" than that of the most serious group, the defendant's total offense level is raised by one level. *See id.* § 3D1.4(b).

This is precisely the situation in Custable's case. As calculated by the PSR and adopted by the district court, the offense level for the group of fraud and contempt counts was forty-one, nine levels above that of the obstruction group, which was thirty-two.

Reducing by one the offense level for his fraud counts will simply trigger the above grouping rule and result in the addition of a level to Custable's combined offense level, negating any reduction in the Guideline range.[1] *See id.* We have no reason to believe that an error that did not affect the Guideline range affected the district court's sentencing decision as the district court stated its intention to impose a sentence within the applicable Guideline range. Any error is thus harmless.

We next turn to Custable's second claim, that the PSR impermissibly double-counted when it increased his offense level for violating a judicial order, *id.* § 2B1.1(b)(8)(c), and for obstructing justice, *id.* § 3C1.1. The rule against double-counting prevents a district court from imposing "two or more upward adjustments within the same Guideline range when both are premised on the same conduct." *United States v. Blum,* 534 F.3d 608, 612 (7th Cir.2008) (citing *United States v. Schmeilski,* 408 F.3d 917, 919

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[1] The PSR set the offense level for Custable's second group of counts, the obstruction group, at 32. Reducing by one the offense level for the fraud/contempt group will result in an offense level of 40. The offense level applicable to the obstruction counts will thus be "8 levels less serious than the Group with the highest offense level," *see* U.S.S.G. § 3D1.4(b), and Custable's total offense level will be adjusted upward by one level.

Though the parties propose various ways to regroup the counts, none of them eliminates the need for two groups, one containing the fraud and another containing at least one obstruction count. *See id.* § 3D1.2 cmt. n. 5.

(7th Cir.2005)). Here, the district court's application of both enhancements was not double counting because each was based on distinct conduct, one for transferring frozen funds in violation of a judicial order and the other for interfering with the SEC's investigation.

Third, Custable argues that the district court failed to account for his cooperation with the government or adequately consider the factors under 18 U.S.C. § 3553(a), and that the court violated the Constitution's prohibition against ex post facto laws by sentencing him under a later, harsher version of the Guidelines than that in effect at the time of the crimes. As a result, Custable says his sentence is unreasonable. As discussed above, we review the district court's sentencing procedures, including its consideration of the § 3553 factors de novo, *United States v. Corson,* 579 F.3d 804, 813 (7th Cir.2009), and the substantive reasonableness of Custable's sentence for abuse of discretion. *Poetz,* 582 F.3d at 837.

In light of the Sentencing Guidelines' advisory nature, a district court must give meaningful consideration to the § 3553 factors, as well as the Guidelines range, and the sentence must be "objectively reasonable in light of the statutory factors and the individual circumstances of the case." *United States v. Shannon,* 518 F.3d 494, 496 (7th Cir.2008). Rather than address each factor, the district court need only provide an adequate statement of its reasons why the selected sentence is appropriate. *Id.* (citing *United States v. Harris,* 490 F.3d 589, 597 (7th Cir.2007)).

Though it ultimately imposed a sentence within the Guidelines range, the district court adequately considered the § 3553 factors and we do not find the sentence unreasonable. In addition to discussing its reasons at length during the sentencing hearing, the court provided a detailed written statement with its sentencing order. The court's statements indicate its consideration of Custable's cooperation with the government, which it termed "substantial" and "extensive." It also considered Custable's family circumstances and acceptance of responsibility. The court's reasoned consideration of the § 3553 factors and the individual circumstances of Custable's case comports with its discretion to fashion a sentence "sufficient but not greater than necessary" to satisfy the objectives of the Guidelines. 18 U.S.C. § 3553(a). The mere fact that the defendant cooperated with the government did not bind the court to impose a lenient sentence. The court found significant Custable's history of unlawful financial dealings, his role as "mastermind" of the scheme, the level of planning required, and his failure to repatriate from an offshore bank account the proceeds of his scheme. We do not find unreasonable its determination that these factors tipped the balance in favor of a within-Guidelines sentence.

Finally, we dispose of Custable's argument that the court's reliance on the 2008 version of the Guidelines violates the Constitutional prohibition against ex post facto laws. Custable claims that the 2008 Guidelines impose a more serious offense level, and

thus a harsher sentence, than the Guidelines in effect in 2001 or 2002 when he committed the offenses. Section 2B1.1 of the 2002 Guidelines calls for a base offense level of six, and a four-point enhancement for the number of victims, instead of the six-point increase Custable received under the 2008 Guidelines. But this argument is foreclosed by *United States v. Demaree,* 459 F.3d 791, 795 (7th Cir.2006). In *Demaree,* we held that, because the Guidelines are only advisory in nature, a court's use of a later version does not offend ex post facto. *Id.* We find no reason to abandon that conclusion today. *United States v. Nurek*, 578 F.3d 618, 626 (7th Cir.2009); *see also United States v. Panice,* 598 F.3d 426, 435 (7th Cir.2010).

B. Favara

Favara similarly challenges the reasonableness of her sentence. She argues that the judge treated the Sentencing Guidelines as mandatory and thus failed to adequately consider her arguments for a below-Guidelines sentence, especially the role her now controlled bipolar disorder played in her fraudulent conduct.

We presume the district court's imposition of a within-Guidelines sentence is reasonable and review it for abuse of discretion. *Poetz,* 582 F.3d at 837. We review de novo its procedures during sentencing, including the court's consideration of the § 3553 factors. *Id.*

Judge Manning, in correcting an error in the initial Guideline calculation, stated that her "intent was to impose the low end of the Guideline range." Favara says this statement is evidence that the judge presumed the reasonableness of the Guidelines and did not adequately consider arguments in favor of a below-Guidelines sentence.

Though the district judge indicated her intent to set Favara's sentence at the low end of the range, when viewed in context, the judge's comment and the resulting sentence were based on her view that a within-Guideline sentence was appropriate *in Favara's case. See United States v. Diaz,* 533 F.3d 574, 577 (7th Cir.2008). The judge recognized her discretion to impose a sentence below the Guidelines, if warranted. At the second sentencing hearing, the judge acknowledged her discretion to depart from the Guidelines, saying, "I can impose whatever sentence I deem appropriate under [§] 3553." That she also attached a thirteen-point explanation, based on Favara's unique circumstances, as to why a within-Guidelines sentence was appropriate in this case further indicates her recognition of the Guidelines' advisory nature.

Judge Manning's written statement that Favara's difficult past "favors leniency," further shows that she recognized her discretion, but thought leniency was not appropriate. Further buttressing this view is the fact that the judge imposed a bottom-of-the-Guidelines sentence despite her recognition of several aggravating factors – including Favara's theft of an

elderly couple's retirement savings *while on bond in the present case* – that warranted a "very tough sentence." The judge clearly recognized the advisory nature of the Guidelines and appropriately based her sentence on the facts of Favara's case.

Favara next presents a series of arguments that the judge gave inadequate consideration to her bipolar disorder, and that Favara committed the offense "while suffering from a significantly reduced mental capacity." As we indicate above, the judge indeed considered Favara's illness. She permitted a psychiatric evaluation and delayed sentencing to allow Favara to present the report. Both at the sentencing hearing and in her written memorandum explaining the sentence, the judge acknowledged that Favara's bipolar disorder was a factor contributing to the offenses and favored leniency. But she went on to state that the seriousness of Favara's conduct and her inability to remain compliant with treatment despite a longstanding awareness of the bipolar disorder favored a harsh sentence. The law requires no more. The discretion to impose a below-Guidelines sentence is in the judge's hands. A sentencing judge must indicate her consideration of arguments in favor of mitigation under § 3553. But she is not *required* to reduce the sentence anytime a defendant presents evidence that mental illness was a factor. *See United States v. Campos*, 541 F.3d 735, 750-51 (7th Cir.2008) (defendant must rebut presumption that within-Guidelines sentence is reasonable).

Finally, Favara's 70-month sentence was not unwarrantedly disparate from her co-defendants, several of whom received probation. Section 3553 requires the judge to consider, among other things, whether a particular sentence would create unwarranted disparities with other defendants, but only among defendants with "*similar records* who have been found guilty of *similar conduct*." 18 U.S.C. § 3553(a)(6) (emphasis added). Favara omits the emphasized language from her brief, but that makes it no less fatal to her argument. The judge indicated in her written explanation that she considered the disparity, but found it warranted in light of the seriousness of the offenses, Favara's history, and the fact that she embezzled $150,000 while awaiting trial. "Unlike the other co-defendants . . . Favara's conduct followed a long history of other fraudulent behavior." The judge thus adequately considered any disparity between Favara's sentence and those of her co-defendants and in any event Favara's conduct and record warranted such a disparity.

III. CONCLUSION

The error in Frank Custable's offense level calculation was harmless. Neither his nor Christine Favara's sentences are unreasonable. We affirm.

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Blanche M. Manning
Sitting Judge if Other than Assigned Judge	
CASE NUMBER	05 CR 340
DATE	June 15, 2009
CASE TITLE	*U.S. v. Custable*

DOCKET ENTRY TEXT

For the reasons stated below, the defendant's motion to correct his sentence pursuant to Fed. R. Crim. P. 35(a) [352-1] is denied.

■ [For further details see text below.]

00:00

STATEMENT

Frank Custable has filed a motion to correct his sentence under Fed. R. Crim. P. 35(a). As an initial matter, the court notes that Custable has failed to comply with this court's standing order, which states that motions must be filed at least three days prior to the date for which they are noticed. Any future motions by Custable that do not comply with the court's standing order are subject to being stricken.

Custable argues that his sentence should be changed for two reasons. First, he contends that the court's use of the version of the Sentencing Guidelines in effect at the time of sentencing violates the *Ex Post Facto* clause of the U.S. Constitution and that the court should use the version of the Guidelines in effect at the time of the offense. As Custable acknowledges, this argument is foreclosed by *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006). *See also United States v. Hill*, 563 F.3d 572, 582 (7th Cir. 2009) ("[T]here is no *ex post facto* problem posed by applying the version of the Guidelines in effect at the time of the defendant's sentencing, even if that version incorporates disadvantageous revisions that took effect after the defendant committed the offense.").

Second, Custable argues that the court's sentence on Count 22 violates the Double Jeopardy Clause of the U.S. Constitution because the conduct which formed the basis for Count 22 is conduct that he asserts was used in aggravation by Judge Andersen in sentencing Custable in case no. 02 CR 1105. Again, however, Custable's argument fails in light of relevant precedent. *Witte v. United States*, 515 U.S. 389, 403-05 (1995) ("[P]etitioner's double jeopardy theory – that consideration of uncharged conduct in arriving at a sentence within the statutorily authorized punishment range constitutes "punishment" for that conduct – is not supported by our precedents, which make clear that a defendant in that situation is punished, for double jeopardy purposes, only for the offense of which the defendant is convicted."). *See also*

United States v. Troxell, 887 F.2d 830, 836 (7th Cir. 1989) (finding no double jeopardy violation where court considered defendant's violation of conditions of release – including fleeing the jurisdiction and failing to appear at sentencing – in sentencing defendant on narcotics charge and defendant was then indicted and sentenced separately for failing to appear at sentencing hearing). As with all of the factors raised by Custable, the court fully considered Custable's argument under § 3553 in arriving at a sentence that was sufficient but not greater than necessary to serve the purposes of sentencing.

Custable's motion to correct his sentence is denied.

RH/p

UNITED STATES DISTRICT COURT

Northern District of Illinois

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	(Filed Jun. 9, 2009)
Frank J. Custable, Jr.	Case Number: 05 CR 340-1
	USM Number: 15078-424
	Jeffrey Steinbeck Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) 1, 2, 3, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22 of the indictment

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC §1343	Wire Fraud	6/30/2002	1-8, 11-17
15 USC §77x	Securities Fraud	6/30/2002	18, 19
18 USC §1505	Obstruction of Justice	6/30/2002	20

The defendant is sentenced as provided in pages 2 through 11 of this judgment. The sentence is

imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☑ Count(s) all remaining ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

6/9/2009
Date of Imposition of Judgment

/s/ Blanche M. Manning
Signature of Judge

Blanche M. Manning	U.S. District Court Judge
Name of Judge	Title of Judge

6/13/2009
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 USC §1503(a)	Obstruction of Justice	6/30/2002	21
18 USC §401(3)	Criminal Contempt of Court	6/30/2002	22

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

as to counts 1, 2, 3, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20; 60 months,

as to count 21; 120 months,

as to count 22; 262 months; all said counts shall run concurrently.

☐ The court makes the following recommendations to the Bureau of Prisons:

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

3 years as to counts 1, 2, 3, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22, said counts to run concurrently. Drug tests shall not exceed more than 104 tests per year. Defendant shall provide the probation officer with access to any requested personal or business financial information. If defendant is unemployed after the first 60 days of supervision, or if unemployed for 60 days after termination or

lay-off from employment, the defendant shall perform at least 20 hours of community service work per week at the discretion and direction of the U. S. Probation Office until gainfully employed. Defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer. Defendant shall refrain from obtaining employment having fiduciary responsibilities, without the approval of the probation officer. Upon completion of the terms of incarceration, any fine balance shall become a condition of supervised release, and the payment schedule will be 10% of defendant's net monthly income.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 2,000.00	$ 20,000.00	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

☑ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☑ the interest requirement is waived for the ☑ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☑ Lump sum payment of $ 22,000.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ **F** below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60*

days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

Upon completion of the terms of incarceration, any fine balance shall become a condition of supervised release, and the payment schedule will be 10% of defendant's net monthly income. Costs of incarceration and supervision are waived.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)
Plaintiff,	) No. 05 CR 340-1
v.	) The Honorable Blanche Manning) Judge Presiding
FRANK CUSTABLE,	)
Defendant.	)

DEFENDANT, FRANK CUSTABLE'S, DECLARATION IN SUPPORT OF HIS PLEA OF GUILTY

(Filed Jul. 11, 2008)

1. The defendant acknowledges that he has been charged in an indictment with (a) mail and wire fraud, in violation of 18 U.S.C. §§ 1341 and 1343, (b) making false statements in a registration statement filed with the Securities and Exchange Commission ("SEC"), in violation of 15 U.S.C. § 77x, (c) obstruction of both an SEC proceeding and a federal district court proceeding, in violation of 18 U.S.C. §§ 1505 and 1503(a) and (d) contempt of a court date, in violation of 18 U.S.C. § 401(3).

2. The defendant has read the charges against him contained in the indictment, and those charges have been fully explained to him by his attorney.

3. The defendant fully understands the nature and elements of the crimes with which he has been charged.

4. The defendant will enter a voluntary plea of guilty to Counts One through Twenty-Two of the indictment in this case, charging mail fraud and securities fraud, respectively.

5. The defendant will plead guilty to Counts One through Eight and Counts Eleven through Twenty-Two because he is in fact guilty of the charges contained in Counts One through Eight and Counts Eleven through Twenty-Two of the indictment. In pleading guilty, the defendant admits the following facts, which establishes his guilt beyond a reasonable doubt:

Beginning no later than April 2001, and continuing until at least June 2002, in the Northern District of Illinois, Eastern Division, and elsewhere, the defendant knowingly devised and intended to devise a scheme to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations, promises and omissions. On various dates in this frame, at Addison, in the Northern District of Illinois, Eastern Division, and elsewhere, the defendant for the purpose of executing and attempting to execute the above-described scheme, knowingly caused to be transmitted in interstate commerce, for example on March 14, 2002, from Murray, Utah, to Addison, Illinois, by means of wire and radio communications, certain writings, signs,

signals and sounds, namely a facsimile transmission containing a sworn and notarized affidavit signed by co-defendant Gary Heesch stating that Wasatch Pharmaceuticals, Inc. ("Wasatch") owed 30 million shares of Wasatch stock to Individual A for services rendered to Wasatch prior to December 1999, when in truth and fact, compensation in this amount was not due and owing, in violation of Title 18, United States Code, Sections 1343 and 2.

As an additional example, on May 10, 2002, the defendant along with co-defendants Sara Wetzel, Gary Heesch and David Giles caused untrue statements to be made, and material facts which were necessary to make statements not misleading, to be omitted, in a Form S-8 registration statement filed on behalf of Wasatch Pharmaceutical, Inc. ("Wasatch"), a publicly-traded corporation organized under the laws of Utah. The registration statement was filed with the Securities and Exchange Commission under the Securities Act of 1993. The S-8 registration statement falsely represented that Individual B would provide consulting services to Wasatch in exchange for issuance to Individual B of 380 million shares of common stock in Wasatch, when in fact, as the defendants knew no such services were desired by Wasatch. Individual B was not qualified to provide such services, and the offer of securities was really made in connection with a transaction to raise capital for Wasatch. Accordingly, the S-8 registration statement was made in violation of Title 15, United States Code, Section 77x.

Specifically, and as explained in more detail below, the defendant admits that during the period alleged in the indictment, he was engaged in a scheme to commit securities fraud by illegally acquiring the stock of publicly-traded companies, causing the market for those stocks to be artificially stimulated and then attempting to sell the stock at a profit. To acquire the stock, the defendant used several, methods of circumventing the registration provisions of the securities laws, including the filing of Form S-8 registration statement that contained misrepresentations about consulting services, evading the requirements of Rule 144 by falsely claiming that stock was being issued to certain individuals as compensation for services rendered more than two years previously, and making improper loans that were collateralized by shares of otherwise restricted stock. The defendant admits that he and the entities he controlled realized a profit through the scheme to defraud.

Defendant CUSTABLE admits that he founded and was president of both Suburban Capital Corporation ("SCC") and North Coast Investments, Inc. ("NCI"). SCC and NCI shared office space in Addison, Illinois, and CUSTABLE controlled all of their operation. CUSTABLE hired co-defendant Sara Wetzel in about 1998 to work at one of SCC's predecessor companies, and she worked as his assistant at both SCC and NCI once they began to operate. Among other things, Wetzel was in nearly daily contact with the companies that were a part of the scheme and CUSTABLE often had Wetzel fax to the companies

documents that were integral to the scheme. She also had contact with co-defendant Jesse Boskoff and understood that his role was to publicize the companies, often using false or misleading information, so that the market for the stocks would remain liquid, allowing the shares acquired by CUSTABLE to be sold more easily.

I. Acquiring the Stock

A. Form S-8 Shares

Defendant, CUSTABLE admits that he understood that a publicly-traded company was permitted to use Form S-8 to register shares and issue freely-trading shares as compensation to a consultant who had performed services for the company. CUSTABLE further understood that the services rendered by the consultant had to be bona fide services and that the services could not be for the purpose of promoting or maintaining a market for the company's stock. CUSTABLE also knew that the services could not be provided in connection with a capital-raising transaction on behalf of the company. If any one of these requirements were not met, then no freely-trading, shares could be issued under Form S-8. CUSTABLE discussed the Form S-8 requirements with, among others, co-defendants Robert Luce and David Calkins. Both Luce and Calkins explained to CUSTABLE and discussed with him the requirements for issuing Form S-8 stock. Furthermore CUSTABLE had conversations with others at the various companies

about Form S-8 and the requirements there under, including conversations with co-defendants Heesch, Giles, Nordling and Favara. Sometimes Luce was a party to such conversations, in which case, Luce would frequently take the lead in explaining the requirements of Form S-8 to the individuals at the companies.

CUSTABLE and the other defendants (except Boskoff) engaged in transactions that were designed to appear to be legitimate Form S-8 transactions. In reality, however, these transactions were capital-raising transactions in which a company received cash from CUSTABLE or an entity he controlled, in exchange for issuing Form S-8 stock to individuals who were purportedly providing consulting services to the company pursuant to boilerplate consulting contracts that were drafted by Luce or another attorney hired by CUSTABLE and that were approved by CUSTABLE. With notable exceptions, the purported consultants were not qualified to provide bona fide services to the company, and, in fact, did not provide consulting services. Generally, CUSTABLE, sometimes in consultation with individuals at the company, would determine the number of shares that were to be issued under Form S-8 in exchange for the purported consulting services. The number of shares selected had no relationship to the services actually provided to the company by the purported consultants.

The individuals at the companies, including defendants Calkins, Heesch, Giles, Nordling and

Favara, at CUSTABLE'S request, each signed consulting agreements with individuals whom they know either generally worked for CUSTABLE or had been chosen by him and whom they knew were generally not qualified to render consulting services. In fact, the individuals at the companies on a number of occasions told CUSTABLE and others that they did not actually want any consulting services; rather they explained to CUSTABLE and others, what they wanted to receive for their companies was money, and so the consulting agreements often were simply a vehicle used to effect the transfer of funds from CUSTABLE to the companies. CUSTABLE had conversations in which this understanding was expressly discussed with, among others, Calkins and Favara.

The Forms S-8, which generally included copies of the consulting agreements were prepared by Luce and another attorney hired by CUSTABLE and then filed electronically with the SEC. Luce was familiar with some of the individuals listed in the agreements as consultants, including Wetzel and a person identified in the indictment as Individual B, and defendant understood that Luce knew that many of these individuals were not qualified to render the services called for under the contracts. In addition, CUSTABLE often discussed with Luce the payment of funds to the companies in exchange for the issuance of the Forms S-8 shares, and thus Luce knew that the transactions were capital-raising transactions for the companies.

Although CUSTABLE did not expressly describe the requirements of Forms S-8 to Wetzel, in the course of performing her work at SCC and NCI she understood (and CUSTABLE would sometimes tell her) that in order for a company to be able to issue Form S-8 stock, a consulting agreement needed to be in place with the company, even where, as was frequently the case, the company expressed to Wetzel that it did not want the purported consulting services. CUSTABLE was aware that representatives from the companies often told Wetzel that they were entering into the Form S-8 transaction for the sole purpose of raising funds. On several occasions, CUSTABLE selected Wetzel herself to act as a consultant and to enter into contracts with, among others, ShareCom, Wasatch, Pacel and Premier Axium. In these contracts, Wetzel agreed to provide consulting services to the companies. In addition, on at least one occasion, CUSTABLE told an individual who was purportedly acting as a consultant (identified in the indictment as Individual B) that Individual B was not supposed to actually provide consulting services, but merely to serve as a strawman and conduit to allow CUSTABLE to receive Form S-8 stock from the companies. Wetzel was present when CUSTABLE told this to Individual B.

Pursuant to the Form S-8 transactions, co-defendants Calkins, Heesch, Giles, Nordling and Favara received on behalf of their companies cash from CUSTABLE in exchange for providing the

purported consultants with stock issued under Form S-8.

B. Friendly Shareholder Transactions

Defendant CUSTABLE admits that he understood that generally a publicly-traded company was required to issue restricted stock unless it had filed a registration statement with the SEC. CUSTABLE, knew, however, that under SEC Rule 144, a company could issue freely-trading shares to certain non-affiliates without filing a registration statement if those non-affiliates were being issued the stock in satisfaction of a debt that had arisen two or more years before the transfer. Once the non-affiliate had these shares, he or she could then transfer them to someone else and the shares would remain free-trading. CUSTABLE first learned about this kind of transaction from defendant Luce in early 2001. Around that time, CUSTABLE also discussed such transactions with defendant Calkins, who told CUSTABLE that he already knew about them and explained to him how they could be exploited.

CUSTABLE and co-defendants Wetzel, Luce, Calkins, Heesch, Giles, Favara and Nordling engaged in transactions that appeared on the surface to be legitimate non-affiliate transfers of stock, but which, in reality, were designed to funnel stock to CUSTABLE and to other individuals who, because they were promoting the stock, could not be compensated with shares issued under Form S-8. To engage

in these transactions, the company would identity a person to whom it falsely claimed it owed a debt that arose two or more years previously. Luce or another attorney, Individual J, hired by CUSTABLE would then draft the required attorney opinion letter that would falsely state that the debt did, in fact, arise two or more years previously. Using this fraudulent opinion letter, the company would then direct its transfer agent to issue freely-trading shares to the identified person, the so-called friendly shareholder. This person would then transfer the shares to CUSTABLE or to other individuals or entities CUSTABLE directed. CUSTABLE generally determined the individuals who would receive shares from the friendly shareholder and the number of shares that each individual would receive. Some of these individuals were promoters of the stock who could not otherwise receive shares issued under Form S-8. CUSTABLE discussed these transactions with Wetzel, Luce, Calkins, Heesch, Giles, Favara and Nordling.

For example, in about July and August 2001, Calkins identified an individual whom he intended to use as a "friendly shareholder." This individual was not owed any compensation from Pacel fro work performed more than two years previously, and Calkins and CUSTABLE discussed the fact with each other, as well as with Luce. Nevertheless, Luce wrote an attorney opinion letter in which Luce falsely stated that Pacel could issue 17.5 million freely-trading shares to the individual because the individual was owed compensation for work done two

years previously. At CUSTABLE's direction, Calkins then directed that the Pacel transfer agent issue the 17.5 million shares. At the same time, CUSTABLE also gave Calkins the names of three individuals who were to receive these 17.5 million shares from the so-called "friendly shareholder" and the number of shares that each such individual would receive. Specifically, CUSTABLE directed that the majority of the shares (10,000,000) be transferred to Individual D, a person who worked for CUSTABLE and who would dispose of the shares as directed by CUSTABLE, providing the proceeds to CUSTABLE. CUSTABLE also directed that some of the 17.5 million shares be transferred to defendant Boskoff in exchange for promoting Pacel stock. Calkins then caused the transfer agent to issue the shares to the individuals in the amounts directed by CUSTABLE.

Similarly, in about March 2002, defendants Heesch and Giles identified an individual whom they claimed to be owned compensation by Wasatch for services rendered more than two years previously. In fact, as Heesch and Giles well know, this individual, identified in the indictment as Individual A, was not owned compensation from Wasatch, and CUSTABLE discussed this fact with, among others, Heesch and an attorney. Nevertheless, Heesch falsely represented that the friendly shareholder was owed such compensation and the other attorney wrote an opinion letter to that effect, which authorized the Wasatch transfer agent to issue 30 million shares of Wasatch to Individual A. CUSTABLE and Wetzel received copies of

these false documents. CUSTABLE determined how Individual A disposed of the 30 million shares.

Pursuant to the friendly shareholder transactions, defendant CUSTABLE, and co-defendants Luce, Wetzel, Calkins, Heesch, Gils, Nordling and Favara authorized the issuance of shares to friendly shareholders, who then, at CUSTABLE's direction, transferred the shares to other individuals and to stock promoters.

II. Promoting the Stock

Once defendant CUSTABLE had obtained control over restricted stock, and had converted it to freely-trading stock, he faced a further obstacle in selling it. The companies to which CUSTABLE was providing financing were traded on the OTC Electronic Bulletin Board, and all of the them were experiencing financial difficulties. Accordingly, there was little or no market for the stock CUSTABLE had acquired from them, even after its apparent status had been changed to freely trading stock.

In order to create a market for his shares, defendant CUSTABLE enlisted co-defendant Jesse Boskoff to send out thousands of unsolicited electronic mail messages ("spam") to the public, often containing materially false and misleading information about the companies' past performance and current financial condition, as well as unreasonably optimistic projections of the companies' future performance.

Defendant CUSTABLE was referred to defendant Boskoff in 2001 by an acquaintance, who told him that Boskoff operated a company called Metro Media, and was very good at promoting companies over the internet. CUSTABLE called Boskoff and told him that he needed to get out of stock he owned in ten different companies. Boskoff told him that Boskoff could help CUSTABLE out by sending emails and "fax blasts" to potential investors.

One of the stocks defendant CUSTABLE was eager to sell was Sharecom. This stock was illiquid, meaning that there were little or no market or sales volume in the stock. CUSTABLE told Boskoff that he wanted to sell his stock in Sharecom. Boskoff's company, Metro Media Research, entered into a contract with Sharecom to do promotional work.

Boskoff started sending mass email press releases about Sharecom to the public about November 2001. The spam emails Boskoff sent about Sharecom contained materially false information about revenues. Boskoff composed the text of the promotional emails. Boskoff told CUSTABLE that he had merely cut and pasted old information about Sharecom that Boskoff found on the internet and in SEC filings. The spam emails Boskoff sent out claimed falsely that Sharecom was "currently booking revenues of $45,000 per month." That information was no longer accurate due to deterioration of the company's financial position. Boskoff knew that the statements about revenue were false, and that Sharecom was conducting little or no current business, but his emails were designed

to create market volume so Custable and Boskoff could sell their stock in Sharecom.

Because of the mass spam transmissions, defendant Bradley Nordling's internet service provider became jammed with complaints. As a result, Nordling became concerned that his website might be terminated. Nordling asked CUSTABLE to make Boskoff stop sending out the fraudulent promotional emails, but CUSTABLE wanted the spam emails to continue, since they increased trading volume for the stock and allowed CUSTABLE to sell off his Sharecom stock.

Boskoff received two payments of $30,000 each from Sharecom for his activities in promoting the stock. One of these payments came from money provided by CUSTABLE to Sharecom as part of a fraudulent deal for S-8 stock issued for non-existent consulting services. CUSTABLE had had the money put into an escrow account controlled by co-defendant Luce. The money was only released after CUSTABLE was able to sell his Sharecom stock. Luce knew that Boskoff was sending out false information in his promotional spam about Sharecom because defendant Nordling had told Luce about it. Luce knew that the $30,000 payment from his escrow account was going to Boskoff and also knew the purpose of the payment.

Boskoff was given Sharecom stock as an additional part of his compensation for promoting its shares. At CUSTABLE's direction, the stock that Nordling and Sharecom had issued to Individual H as

part of a "friendly party" transaction, was transferred to Boskoff.

Defendant CUSTABLE also put Boskoff in touch with co-defendant David Calkins, so Boskoff could promote the stock of Pacel. CUSTABLE was holding Pacel stock that he had obtained from Calkins through intermediaries, including Individual D, posing as consultants to Pacel, but the stock was illiquid. CUSTABLE told Calkins that he would not give him any more money until he was able to sell the Pacel stock. CUSTABLE took part in a three-way conversation between himself, Boskoff and Calkins, in which Calkins provided Boskoff with information about Pacel. Boskoff used this information, together with information from SEC filings and from the internet, to compose promotional spam email which he transmitted to the public.

CUSTABLE also introduced Boskoff to co-defendant Christine Favara, Chief of Executive Officer of Premier Axium. Premier Axium, like all the companies CUSTABLE referred to Boskoff, was in desperate financial straits, and CUSTABLE made that fact known to Boskoff. Boskoff had told CUSTABLE that Boskoff promoted "aggressively." CUSTABLE wanted aggressive promotion, since he could not sell his stock unless Boskoff was able to increase trading volume.

CUSTABLE also introduced co-defendant Boskoff to defendant Gary Heesch at Wasatch Pharmaceuticals. CUSTABLE hoped that Boskoff's spam emails

would move the market price, so that he could sell his stock in Wasatch at a profit. Boskoff sent CUSTABLE a copy of the draft agreement he entered into with Wasatch, which called for Boskoff to be compensated.

III. Disposing of the Stock

The defendant caused stock acquired through S-8, "friendly shareholder," and these company loan transactions to be deposited in brokerage accounts in the names of others. The defendant did this to avoid reporting obligations to the SEC that would have arisen if he had been known to hold over 5% of the stock of any of the companies, and additional obligations that would have arisen had he been known to hold over 10% of any of them. Accordingly, defendant CUSTABLE directed co-defendant Sara Wetzel to open brokerage accounts in the names of co-defendant Wetzel, Individual B, Individual D, Individual E and others. Stock acquired through the transactions that are the subject of the indictment was deposited into these accounts, sometimes without the knowledge of the nominal account holder. Although the accounts were in the names of others, the defendant retained full control of the stock, which he usually exercised through Wetzel, and determined the time and manner in which the stock was disposed of.

IV. The SEC Investigation

In early 2002, defendant CUSTABLE and co-defendant Luce became aware that the Securities and

Exchange Commission (SEC) had begun an investigation of the activities which form part of the factual basis for the charge to which CUSTABLE is pleading guilty. After he learned of the investigation, CUSTABLE was contacted by a former employee, Individual B. CUSTABLE was concerned, because he knew that at his direction defendant Sara Wetzel had told Individual B to sign fraudulent consulting agreements, which compensated Individual B with millions of shares of stock in Wasatch, in exchange for consulting duties which Individual B never intended to perform.

CUSTABLE called defendant Robert Luce expressing his concerns over the prospect of Individual B's cooperation with the SEC. Luce was CUSTABLE's own attorney. CUSTABLE advised Luce that the SEC had contacted Individual B. Luce told CUSTABLE that Luce would "defuse" the SEC investigation. Luce also said that he would contact the SEC and tell them that Individual B would assert his rights under the Fifth Amendment. Luce was CUSTABLE's own attorney, had not been retained by Individual B to represent him, and had not even met or spoken with Individual B. Luce did contact the SEC and tell them that Individual B was asserting his Fifth Amendment rights and would not talk to them.

V. The SEC Lawsuit

On March 28, 2003, CUSTABLE was served with a federal court order freezing his assets in connection

with federal lawsuit brought against him by the SEC, SEC v Frank J. CUSTABLE, Jr., et al, 03 C 2182 (Northern District of Illinois). The order was applied to CUSTABLE's company, Suburban Capital, and to defendant Sara Wetzel. Wetzel was served on or about March 29, 2003. The order was entered by a United States District Judge, and prohibited CUSTABLE, Wetzel and Suburban Capital from transferring, dissipating or concealing any property in the possession of any of them.

Although he knew that moving money out of the accounts of Suburban Capital was prohibited by the asset freeze order, about three days after being served with the order, CUSTABLE withdrew $10,000 from the operating account of Suburban Capital and deposited it into an account over which he alone had signatory authority. He used this money to pay personal expenses. In addition, CUSTABLE instructed co-defendant Sara Wetzel to withdraw funds from accounts of Suburban Capital which both he and she knew to have been frozen by the court order.

The preceding facts are offered solely for the purpose of establishing a factual basis for the defendant's plea of guilty; they do not contain all of the information known by the defendant concerning the charged crimes.

6. For purposes of calculating the guidelines promulgated by the United States Sentencing Commission pursuant to 28 U.S.C. § 994, it is the defendant's position that the following guidelines from the

2001 Sentencing Manual are used as they are more favorable to the defendant than the current guideline manual:

(a) Pursuant to USSG § 2B1.1(a), the base offense level is 6.

(b) The defendant's position is that the loss was less than $2.5 million and that either a 16-level increase is appropriate under USSG § 2B1.1(b)(I) if the loss is determined to be between $1 million and $2.5 million or a 14-level increase is appropriate under USSG § 2B1.1(b)(1)(H) if the loss is determined to be between $400,000 and $1 million.

(c) Because mass marketing was involved, a 2 level increase in the offense level is required by USSG § 2B1.1(b)(2)(A).

(d) It is the Government's position that the offense involved sophisticated means, and that therefore a 2-level increase in the offense level is required by USSG § 2B1.1(b)(8). The defendant remains free to disagree with this 2-level increase.

(e) Because the defendant was an organizer and leader of a criminal activity that involved five or more participants and was otherwise extensive, a 4-level increase in the offense level is required pursuant to USSG § 3B1.1(a).

(f) Because the defendant willfully obstructed and impeded the administration of justice, in the related lawsuit brought by the SEC, a 2-level increase

in the offense level is required by USSG Section 3C1.1.

(g) The defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct. If the government does not receive additional evidence in conflict with this provision, and if the defendant continues to accept responsibility for his actions within the meaning of USSG § 3E1.1, a 2-level reduction in the offense level is appropriate.

(h) The defendant has notified the government timely of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the Court to allocate its resources efficiently, within the meaning of USSG § 3E1.1(b). An additional one-point reduction in the offense level is therefore appropriate, provided the Court determines the offense level to be 16 or greater prior to the operation of USSG § 3E1.1(a).

7. On June 7, 2004, the defendant was convicted in the United States District Court for the Northern District of Illinois of obstruction of justice. On May 16, 2005, he was sentenced to ten months imprisonment. Ordinarily, for this, a defendant would receive 2 criminal history points and his criminal history category would be a category II. However, pursuant to guideline section USSG 4A1.2(a)(1), where the prior conviction is part of the instant offense or same course of conduct, it is not to be considered a "prior sentence" for the purpose of

computing the criminal history. Therefore, it is the defendant's position that he has 0 criminal points and criminal history category of I. Additionally, it is the defendant's position that under the operation of USSG § 5G1.3(b) that the defendant should receive credit for the 10 months of imprisonment he has served in connection with this June 7, 2004 sentence.

Therefore, if there is a 16-level enhancement for loss, the base offense level is 31; and with a criminal history category of I, the guideline range is 108-135.

If it is determined there is a 14-level enhancement for loss, the base offense level is 29, and with a criminal history category of I, the guideline range is 87-108.

8. The defendant, his attorney, and the government acknowledge that the above calculations are preliminary in nature and based on facts known to the government as of the time of this Agreement. The defendant understands that the Probation Department will conduct its own investigation, that the Court ultimately determines the facts and law relevant to sentencing, and that the Court's determinations govern the final Sentencing Guidelines calculation. Accordingly, the validity of this Agreement is not contingent upon the probation officer's or the Court's concurrence with the above calculations.

9. The defendant understands that, in imposing the sentence, the Court will be guided by the United States Sentencing Guidelines. The defendant understands that the Guidelines are advisory, not

mandatory, but that the Court must consider the Guidelines in determining a reasonable sentence.

10. Errors in calculations or interpretation of any of the guidelines may be corrected by either party prior to sentencing. The parties may correct these errors or misinterpretations either by stipulation or by a statement to the probation office or Court or both setting forth the disagreement as to the correct guidelines and their application. The validity of this Agreement will not be affected by such corrections, and the defendant shall not have a right to withdraw his plea on the basis of such corrections.

11. The defendant understands that each count to which he will plead guilty carries a maximum penalty of five years imprisonment and a maximum fine of $250,000 or a maximum fine totaling twice the defendant's gross gain from this fraud scheme or the gross loss caused by the fraud scheme, whichever is greater, and any restitution that the Court may require. The total possible penalty is therefore 100 years imprisonment, and a maximum fine of ~~$5,250,000~~ [5,000,000 /s/ TPG /s/ JBS /s/ EES] or four times the gain or loss caused by the offense. Defendant understands that these counts also carry a term of supervised release of at least two but not more than three years, which the court may specify.

12. The defendant understands that in accord with federal law, Title 18, United States Code, Section 3013, upon entry of judgment of conviction, the defendant will be assessed $100 for each count to

which he has pled guilty, in addition to any other penalty imposed. The defendant agrees to pay the special assessment[s] of ~~$2,200~~ [$2000 /s/ JBS /s/ TPG /s/ EES] at the time of sentencing with a check or money order made payable to the Clerk of the U.S. District Court.

13. The defendant understands that by pleading guilty he surrenders certain rights, including the following:

(a) If the defendant persisted in a plea of not guilty to the charges against him, he would have the right to a public and speedy trial. The trial could be either a jury trial or a trial by the judge sitting without a jury. The defendant has a right to a jury trial. However, in order that the trial be conducted by the judge sitting without a jury, the defendant, the government, and the judge all must agree that the trial be conducted by the judge without a jury.

(b) If the trial is a jury trial, the jury would be composed of twelve laypersons selected at random. The defendant and his attorney would have a say in who the jurors would be by removing prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising so-called peremptory challenges. The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that the defendant is presumed innocent, and that it could not convict him unless, after hearing all the evidence, it was persuaded of the defendant's guilt

beyond a reasonable doubt and that it was to consider each count of the indictment separately.

(c) If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all the evidence, and considering each count separately, whether or not the judge was persuaded of the defendant's guilt beyond a reasonable doubt.

(d) At a trial, whether by a jury or a judge, the government would be required to present its witnesses and other evidence against the defendant. The defendant would be able to confront those government witnesses and his attorney would be able to cross-examine them. In turn, the defendant could present witnesses and other evidence in his own behalf. If the witnesses for the defendant would not appear voluntarily, he could require their attendance through the subpoena power of the Court.

(e) At a trial, the defendant would have a privilege against self-incrimination so that he could decline to testify, and no inference of guilt could be drawn from his refusal to testify. If the defendant desired to do so, he could testify in his own behalf.

14. The defendant understands that by pleading guilty he is waiving all the rights set forth in the prior paragraph. The defendant's attorney has explained those rights to him and the consequences of his waiver of those rights. Defendant further understands that he is waiving all appellate issues that

might have been available if he had exercised his right to trial.

15. The defendant understands that the indictment and this Plea Agreement are matters of public record and may be disclosed to any party.

16. The defendant understands that the United States Attorney's Office will fully apprise the District Court and the United States Probation Office of the nature, scope, and extent of the defendant's conduct regarding the charges against him, and related matters, including all matters in aggravation and mitigation relevant to the issue of sentencing.

17. The defendant agrees that he will fully and truthfully cooperate with the government in any matter which he is called upon to cooperate. This cooperation shall include providing complete and truthful information in any investigation and pretrial preparation, and complete and truthful testimony if called upon to testify, before any federal grand jury and United States District Court proceeding.

18. At the time of sentencing, the defendant understands that the Government shall make known to the sentencing judge the extent of the defendant's cooperation. The defendant understands that the decision concerning what sentence to impose rests solely with the Court.

19. Regarding restitution, the defendant understands that it is the government's position that the number of victims is so large as to make restitution

impractible, and that the complexity of the factual issues in determining the identities and losses of the individual victims would complicate or prolong the sentencing process to a degree that the need to provide restitution is outweighed by the burden on the sentencing process, within the meaning of 18 U.S.C. § 3663A(c)(3).

20. The defendant and his attorney acknowledge that no threats, promises or representations have been made, nor understandings reached, other than those set forth in this plea declaration, to cause the defendant to plead guilty.

21. The defendant agrees that this plea declaration shall be filed and become part of the record in this case.

22. The defendant acknowledges that he has read this plea declaration and carefully reviewed each provision with his attorney. The defendant further acknowledges that he understands and voluntarily accepts each and every term and condition of this plea declaration.

/s/ Frank Custable
FRANK CUSTABLE
Defendant

/s/ Terence P. Gillespie
TERENCE P. GILLESPIE
Attorney for Defendant

/s/ Earl E. Stayhorn
EARL E. STAYHORN
Attorney for Defendant

/s/ Jeffrey B. Steinback
JEFFREY B. STEINBACK
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	No. 05 CR 340-1
vs.	)	Chicago, Illinois
FRANK CUSTABLE,	)	May 14, 2009
Defendant.	)	1:30 p.m.

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE BLANCHE M. MANNING

APPEARANCES:

For the Government: MR. JOHN F. PODLISKA
MR. CHRISTOPHER K. VEATCH
MS. SHOSHANA L. GILLERS
(United States Attorney's Office,
219 South Dearborn Street,
5th Floor,
Chicago, Illinois 60604)

For the Defendant: MR. JEFFREY B. STEINBACK
MS. RACHEL A. KATZ
(Jeffrey B. Steinback, Attorney at Law,
53 West Jackson Boulevard,
Suite 1454,
Chicago, Illinois 60604)

MR. BEAU B. BRINDLEY,
(Law Offices of Beau B. Brindley,
53 West Jackson Boulevard,
Suite 1605,
Chicago, Illinois 60604)

PATRICK J. MULLEN
Official Court Reporter
219 South Dearborn Street, Room 2128,
Chicago, Illinois 60604
(312) 435-5565

* * *

[6] THE COURT: Very well. We'll make that correction.

MR. SMITH: Yes, Your Honor.

THE COURT: Are there any other errors, counsel?

MR. STEINBACK: No, Your Honor.

MR. PODLISKA: We have no others, Your Honor.

THE COURT: All right. The guideline calculations as set forth in the presentence report are as follows. For Counts 1 through 8, 11 through 19, and Count 22, the base offense level is 7. With respect to the specific offense characteristics, the offense level would be increased by 18 due to the fact of the estimated loss, the market loss caused and the profit made, that being more than 2,500,000 and less than $7 million. Based on the number of victims, that being 250 victims, there's a six-level increase.

Because there was allegedly a violation of a judicial order by Mr. Custable, there would be a two-level increase.

The probation officer has dubbed the scheme a sophisticated means and has added a two-level increase. Because Mr. Custable was the organizer, leader, and manager, and it was an extensive scheme that involved at least nine individuals, it will be further increased by four levels. There was an attempt to obstruct justice during the investigation; therefore, there would be a two-level increase, bringing the adjusted offense for those counts to 41.

As to Counts 20 and 21, obstruction of justice, the [7] base offense level is 30. The defendant supervised the actions of other individuals in their attempt to obstruct justice, and there would be a two-level increase. The adjusted offense level for those two counts would be 32.

In grouping them, the combined adjusted offense level is 41. Defendant pled guilty and notified the Government of his intent to do so, so he would be entitled to a three-level reduction. So that brings it down to a level 38.

All right. Counsel, do you wish to – are there any legal issues that you wish to address here?

MR. STEINBACK: Your Honor, counsel who's present with me is going to address a couple of the issues.

THE COURT: Fine.

MR. STEINBACK: The rest of the matters I will take up under 3553.

THE COURT: All right. Counsel?

MR. BRINDLEY: Your Honor, the issue that I'd like to address is the issue of the amount of loss established in the presentence report. One thing that needs to be noted and was noted in our submission to Your Honor regarding sentencing is that certainly whatever the amount of loss is must be mitigated and reduced by the value of services that were literally rendered.

In this matter, I think it's uncontested. It came out at the trial of Mr. Heesch. I don't think there's any

* * *

[84] Program. I also assisted on tutelage for GED. I received 12 certificates during my incarceration for my participation in these programs as well as the victim impact program.

I realize the harm that I've caused my family and loved ones and others for the crimes that I committed, and I promise the Court that I will never commit an illegal act again.

THE COURT: Thank you, sir.

This case in terms of sentencing is really one of the most interesting and difficult ones that I can think of that I've heard in my 15 or so years on this bench. I know everybody is anticipating a ruling at

this moment, and I'm sure that's why you're here. You think I was going to rule today, and I had planned to do that, but I really need to think about this. I need to give it a lot of thought. I need to really think in terms of 3553. I need to think in terms of the guidelines. I need to think in terms of the very positive things that I've heard about the defendant. It really takes a lot of thought here.

Consequently, I say all that to say that I'm going to put this over for a few days so that I can give it some very thorough consideration. I'll make it as convenient as possible. Let's see, today is the 14th. I would suggest the afternoon of May 21st if you're all available that day.

MR. PODLISKA: That's fine.

* * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	No. 05 CR 340-1
vs.	)	Chicago, Illinois
FRANK CUSTABLE,	)	June 9, 2009
Defendant.	)	1:30 p.m.

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE BLANCHE M. MANNING

APPEARANCES:

For the Government: MR. JOHN F. PODLISKA
(United States Attorney's Office,
219 South Dearborn Street,
5th Floor,
Chicago, Illinois 60604)

For the Defendant: MR. JEFFREY B. STEINBACK
MS. RACHEL A. KATZ
(Jeffrey B. Steinback, Attorney at Law,
53 West Jackson Boulevard,
Suite 1454,
Chicago, Illinois 60604)

PATRICK J. MULLEN
Official Court Reporter
219 South Dearborn Street, Room 2128,
Chicago, Illinois 60604
(312) 435-5565

[2] THE CLERK: 05 CR 340, U.S.A. versus Frank Custable for sentencing.

MR. PODLISKA: Good afternoon, Your Honor. John Podliska for the United States.

THE COURT: Good afternoon.

MR. STEINBACK: Good afternoon, Your Honor. Jeff Steinback for Frank Custable.

THE COURT: Good afternoon.

MR. STEINBACK: Mr. Custable is present in court.

THE COURT: All right.

MS. FOWLIE: Good afternoon, Your Honor. Rebecca Fowlie for U.S. Probation.

THE COURT: Good afternoon. This matter is before the Court today for sentencing. Are both sides ready to proceed?

MR. PODLISKA: Yes, Your Honor.

MR. STEINBACK: Yes, Your Honor.

THE COURT: All right. I've read the presentence investigation report. Well, actually, we've been over a great deal of this.

MR. PODLISKA: Yes, we have, Your Honor.

THE COURT: So I believe I've been over what the guidelines are as set forth in the presentence

report, and I believe you've spoken in mitigation, is that correct?

MR. STEINBACK: I have, Your Honor.

[3] THE COURT: And you in aggravation?

MR. PODLISKA: The Government has addressed the Court as well, and Mr. Custable was given his opportunity to address the Court as well.

THE COURT: Is there anything else you'd like to say, Mr. Custable?

THE DEFENDANT: Your Honor, I'd like to just apologize to the Court and the Government, of course. I'd like to – you know, I did everything possible to make the best effort I could to help the Government out any way possible to make up for my crime. I have two small children, and I've put them in a very, very bad situation. I apologize to the Court.

THE COURT: All right. Thank you, Mr. Custable.

All right. In considering the appropriate sentence for Mr. Custable, I have to sentence him to an amount of time that's sufficient but not greater than necessary to comply with the purposes of 3553(a)(2) of Title 18. Those are, number one, to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, to afford adequate deterrence from criminal conduct, protect the public from further crimes of the defendant, and to provide the defendant with needed educational or

vocational training, medical care, or other correctional treatment in the most effective manner.

I've had a considerable amount of time to think about [4] the various considerations under section 3553 as set forth both by the defendant and by the Government in great detail at our last hearing. As an initial matter, I would note that the advisory guideline range is quite high, 262 months to 327 months.

Now, I do acknowledge that you, Mr. Custable, have accepted responsibility for this criminal conduct and that you were given a three-level reduction in your offense level pursuant to section 3E1.1 of the guidelines. You've provided substantial cooperation to the Government. In fact, I think you've been very forthcoming and have provided extensive cooperation.

Nevertheless, I guess, there are many things that the Court cannot ignore. Most important is that you, Mr. Custable, were the mastermind behind the scheme involved in this entire offense. While you went to great lengths at the last hearing to blame other people, including Individual J and co-defendant Luce, for telling you about how one might take advantage of certain loopholes in the securities laws and regulations, it's one thing to know how to commit a crime and it's quite another to do it.

The Court finds that your attempts to deflect blame on others, your attempts to deflect the blame on others to be particularly disingenuous, given your critical role in this offense. You made this scheme happen. It wouldn't have [5] happened without you.

You spoke to knowledgeable individuals about how to manipulate the law, and you played on companies that were in financial difficulty and in vulnerable positions who were willing to accept your offer of fast cash to implement the false S-8 stock transactions. You tracked down Jesse Boskoff to assist in inflating the value of the stock after you fraudulently acquired it, and there is evidence that you created offshore companies to hide your assets outside the reach of the United States courts.

So, Mr. Custable, this was not a one-time crime, like someone going into a bank and robbing a bank one time, which could be characterized as an anomaly in an otherwise law-abiding life. This was a well-thought-out crime that took place over several years and required a great deal of planning and precise execution. While your co-defendants were involved at their own accord, you orchestrated this scheme every step of the way. It simply would not have happened without you.

Now, the Court acknowledges that it must avoid unwarranted sentencing disparities in fashioning a sentence for you. Although the other defendants, except for Christine Favara, I believe, have received varying periods of probation, any disparity between your sentence and that of the other defendants is not unwarranted because the other defendants were not nearly as culpable as you are. As I stated earlier, you [6] concocted this whole scheme. You implemented this whole scheme underlying the instant offenses.

You also went to great pains both in your sentencing memorandum and in your presentation at the last court hearing to tell the Court what a good son, father, and husband you have been. Indeed, certain aspects of your personal history point to a loyal, caring, responsible man who would do anything to help those that you love, but your commitment to your family simply can't override the detrimental effects of your serious unlawful conduct. Indeed, your history demonstrates that you have failed to learn from past mistakes.

For example, in 2005, I believe it was, you were sentenced by Judge Andersen to ten months in the Bureau of Prisons for obstructing justice after you misled the court and the SEC about your ability to pay a $60,000 fine imposed in an SEC civil case, SEC versus Custable.

Additionally, I would note as part of the instant offense you pled guilty to Counts 21 and 22 of the present indictment which charged obstruction of justice and criminal contempt. These two counts stem from your violation of an asset freeze order in another SEC civil case which was pending before Judge Gottschall, I believe it was.

In addition, Mr. Custable, you have several other security laws violations, including a 1991 violation of the Indiana Securities Act, a 1992 censure by the National [7] Association of Securities Dealers, a 1992 censure by the State of Wisconsin for your failure to disclose your disciplinary history and

other misrepresentations related to your sale of mortgage-related investments. These ongoing violations indicate to the Court that a lengthier sentence is absolutely necessary to deter you and to protect the public from further crimes by you.

The Court has also taken into account the Government's evidence that you established offshore bank accounts to conceal assets that you had not yet patriated as ordered by Judge Gottschall in the case of SEC versus Custable and by the magistrate judge in this case.

MR. STEINBACK: Your Honor, may I make one brief point?

THE COURT: Sure.

MR. STEINBACK: The Judge Gottschall case that Your Honor just referred to in Counts 20 and 21, we spent some time discussing that, and that matter was brought to the full attention of Judge Andersen.

THE COURT: I'm sorry?

MR. STEINBACK: The matter of Counts 20 and 21, the substance of the matter was fully, as were the other SEC matters, brought to the attention of Judge Andersen in connection with Judge Andersen's sentencing.

THE COURT: Okay.

[8] MR. STEINBACK: Since Judge Andersen's sentencing, it isn't like there's been any new

misconduct. We're talking here about situations that occurred essentially in 2001, and there has been nothing since then except ongoing cooperation with the Government and Mr. Custable working very hard in prison and out to right these wrongs. I didn't want that to be lost in this.

THE COURT: I'm totally aware of how much he has cooperated with the Government. There is no question about that, and the Court certainly takes that into consideration. There's no question about that.

MR. STEINBACK: Thank you.

THE COURT: Is that all?

MR. STEINBACK: Yes, yes.

THE COURT: All right. So, Mr. Custable, at this time I'm going to commit you to the custody of the Bureau of Prisons in the following manner. As to Counts 1 through 8 and 11 through 20 and Count 22, I will impose a sentence of concurrent terms of 60 months on each count, concurrent with other counts. As to Count 21, I will impose a sentence of 120 months concurrent with other counts. As to Count 22, I will impose a term of 262 months concurrent with other counts.

I'm also ordering that you pay a fine of $20,000 which will be due immediately. I will waive the interest, and I will waive the – I'll waive the interest. I find that the defendant doesn't have the ability to pay the interest on this. [9] I will also waive the cost of

incarceration and supervision. You must pay a special assessment in the amount of $2,000 which is due immediately.

Once you are released from incarceration, you will be placed on a concurrent term of three years supervised release on Counts 1 through 8 and 11 through 22. Within 72 hours of your release from the Bureau of Prisons, you are to report in person to the probation office in the district to which you will be released.

While you're on supervised release, Mr. Custable, you understand that you cannot commit any further criminal offenses, federal, state, local, crimes of any nature. You're to comply with all the standard conditions that this Court has adopted.

Additionally, you're to refrain, of course, from the unlawful use of any controlled substance. You will be subject to a drug test within 15 days of your release from incarceration and thereafter at the direction of your probation officer, not to exceed 104 such tests per year. You can never possess a firearm or other destructive device. If called upon to do so, you are to cooperate in the collection of a DNA sample.

Additionally, you are to provide the probation office at their request with access to any of your personal or business financial information. You're not to incur any new [10] credit charges or open additional lines of credit without the approval of your probation officer unless you're in compliance with your payment schedule. You are to refrain from obtaining

employment having fiduciary responsibilities without the approval of your probation officer.

Upon completion of your term of incarceration, any balance of your fine will become a condition of your supervised release, and your monthly payment schedule will be 10 percent of your net monthly salary or income.

If you're unemployed after the first 60 days of supervision or if you're unemployed for 60 days after termination or layoff from any employment, you are to perform at least 20 hours of community service work per week at the direction and within the discretion of the probation officer until you are gainfully employed.

Are there any questions, sir?

THE DEFENDANT: No, Your Honor.

MR. STEINBACK: Your Honor, when we were last before the Court and the Court asked for time to contemplate all the materials that were presented to it and the arguments, one of the things that Your Honor said that I recall was that there were many good things that Mr. Custable had undertaken in his life.

THE COURT: That's true.

MR. STEINBACK: And it gave the Court some pause. [11] Essentially, Your Honor's decision does not provide for any departure from the bottom of the guideline range for cooperation nor any of the

3553(a) factors that I thought the Court was going to mull over in the interim.

THE COURT: I did mull over it, counsel.

MR. STEINBACK: I was hopeful that there would be some accounting for the years of cooperation and the testimony that was truthful and candid. So that the record is clear at least, my arguments with respect to the involvement of others was factual, not to suggest that Frank was not intimately involved. I had said he was, but others who had been involved were involved to the extent that I had outlined they were and without objection from the Government concerning their roles.

So if there is any disingenuity, it was entirely my responsibility. It was not Mr. Custable saying those things. It was my own analysis based on the information that was contained in the 302s and the discourse that had occurred in the lengthy debriefings about the roles of those people which were as substantial as I had identified them to be.

This was not in any way an effort to minimize Frank's involvement but to explain how this worked as an integrated whole, not as one separate piece where Frank was involved with one aspect, the lawyers had engineered and written up how this could be done, the businesses had their role, and the market makers had their role. Each had a role in this.

[12] While Frank's was the most culpable role, I think with his cooperation and given what I regard and what I think the Government regards as the substantial involvement of at least one of the lawyers and the substantial involvement of another uncharged lawyer and the substantial involvement of the market maker, relatively speaking, I guess I'm asking and urging Your Honor to build in a little hope into what is otherwise a fairly hopeless kind of sentence for a man who's in Frank's situation.

THE COURT: Counsel, as I indicated, I did take all of those matters into consideration. However, I simply cannot ignore his role, the fact that he master-minded this entire scheme. I took all of the those matters into account that you're talking about. I definitely considered them, but it did not overcome it. I think the guideline sentence is the appropriate sentence in this case, and that will be the order.

I would advise you, Mr. Custable, you do have the right to appeal. Should you wish to do so, within ten days of this date you must file a written notice of appeal with the clerk of the court. If at that time you're unable to afford an attorney or a transcript of these proceedings, they'll be provided to you free of charge.

Are there any other questions, sir?

THE DEFENDANT: No, Your Honor.

THE COURT: That will be the order. Good luck to [13] you, sir.

MR. PODLISKA: Your Honor, with respect to the 60 months that are concurrent, that's concurrent on Counts 1 through 8 and 11 through 20, correct?

THE COURT: Yes, that's correct.

MR. PODLISKA: Okay.

THE COURT: And 22.

MR. PODLISKA: Well, but on Count 22 the Court did impose the 262 months.

THE COURT: 262, correct. They're all concurrent with the other counts.

MR. PODLISKA: Then, Your Honor, with respect, there are two remaining counts with respect to Mr. Custable, Counts 9 and 10 of the indictment. As to Mr. Custable, we'll move to dismiss those at this time.

THE COURT: All right. That will be the order. I would ask the Government what you intend now. I believe the companies were indicted as well.

MR. PODLISKA: Yes, Your Honor. That was my next point. We do have Suburban Capital Corporation and North Coast Investments, defendants number 3 and 4 in the indictment, and at this time, Your Honor, we would move to dismiss all the charges against those two corporations in the indictment.

THE COURT: All right. That will be the order.

MR. STEINBACK: Thank you, Your Honor.

[14] THE COURT: Good luck to you, sir.

THE DEFENDANT: Thank you.

MR. PODLISKA: Thank you.

(Recess.)

THE CLERK: 05 CR 340, U.S.A. versus Frank Custable.

THE COURT: Mr. Steinback, didn't leave, did he?

MR. PODLISKA: He's here, Your Honor. He was just in the courtroom a moment ago.

THE COURT: Oh, okay.

(Brief pause.)

MR. STEINBACK: Sorry, Your Honor.

THE COURT: Take your time.

MR. STEINBACK: I didn't think they'd get Frank back down so quickly. I apologize.

THE COURT: Okay. The reason I called everybody back is that I understand I misspoke when I was indicating what the sentence would be. For whatever reason, probably because I took my glasses off, I indicated the terms as to Counts through 1

through 8, 11 through 20, and then I added 22. Count 22 was actually the last one that I intended to mention, so it was an error.

What I intended to say and what the sentence is that for Counts 1 through 8 and 11 through 20, it will be 60 months on each of those counts concurrently. On Count 21, it will be 120 months concurrent with the other counts. Then Count 22, it [15] will be 262 months concurrent with the other counts.

MR. PODLISKA: Yes, Your Honor.

THE COURT: So if I misspoke and mentioned 22 in two different places, I did not intend to do that.

MR. PODLISKA: Yes, Your Honor.

THE COURT: Is that clear? Did I clarify that?

MR. PODLISKA: Yes, Your Honor.

MR. STEINBACK: Yes, Your Honor.

THE COURT: All right. Thank you.

MR. PODLISKA: Thank you, Your Honor.

(Proceedings concluded.)

CERTIFICATE

I, Patrick J. Mullen, do hereby certify that the foregoing is a complete, true, and accurate transcript of the proceedings had in the above-entitled case before the Honorable BLANCHE M. MANNING, one of the judges of said court in Chicago, Illinois, on June 9, 2009.

/s/ Patrick J. Mullen

/s/ Patrick Mullen
Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

No. 10-631

Supreme Court, U.S.
FILED
MAR 4 - 2011
OFFICE OF THE CLERK

In the Supreme Court of the United States

FRANK CUSTABLE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
SCOTT A.C. MEISLER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court violated the Ex Post Facto Clause of the Constitution by applying the version of the advisory Sentencing Guidelines in effect at the time of sentencing.

2. Whether, under plain-error review, petitioner is entitled to relief based on his claim that the one-book rule in Sentencing Guidelines § 1B1.11(b)(3), which requires that the revised edition of the Sentencing Guidelines be used to calculate the advisory sentencing range when the defendant's offenses occurred both before and after the revised Guidelines took effect, violates the Ex Post Facto Clause.

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In the Supreme Court of the United States

No. 10-631

FRANK CUSTABLE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 615 F.3d 824.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2010. The petition for a writ of certiorari was filed on November 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Illinois, petitioner was convicted of wire fraud, in violation of 18 U.S.C. 1343; securities fraud, in violation of 18 U.S.C. 77x; obstruction of justice, in violation of 18 U.S.C. 1503(a) and 1505; and criminal contempt of court, in violation of 18 U.S.C. 401(3). He was sentenced to 262 months of

imprisonment, to be followed by three years of supervised release. Pet. App. 16-19. The court of appeals affirmed. *Id.* at 1-12.

1. Between April 2001 and June 2002, petitioner orchestrated and executed a fraudulent scheme to acquire stock in publicly traded companies that were experiencing financial difficulties, stimulate the market for the stock through misleading mass marketing, and sell the stock at a profit. Petitioner used two fraudulent methods to acquire the stock. Under one of the methods, petitioner or an entity he controlled paid the companies cash in exchange for which the companies issued shares to individuals whom he designated. Petitioner caused the companies to file Form S-8 registration statements with the Securities and Exchange Commission (SEC) that falsely represented that the designees were providing consulting services in exchange for the shares. Under the other method, petitioner had the companies issue unregistered shares to individuals, who then transferred the shares to petitioner or his designees. To create the appearance that the shares were exempt from registration under SEC Rule 144, petitioner had his attorneys prepare documentation falsely indicating that the shares were issued to satisfy debts that had arisen more than two years earlier. Pet. App. 29-39.

Once petitioner or his designees had acquired the shares, petitioner had co-defendant Sara Wetzel deposit them in brokerage accounts under her name and the names of others. This arrangement allowed petitioner to maintain control of the shares while avoiding SEC reporting obligations that attach when an individual holds significant percentages of a company's stock. Petitioner also sought to stimulate the market's interest in the companies' shares, which was low because the companies were facing financial difficulties. To that end,

petitioner hired a college student, Jesse Boskoff, to send out thousands of unsolicited e-mail messages containing materially false and misleading information about the companies. Petitioner then caused the stock to be sold at artificially inflated prices. Pet. App. 39-43.

In early 2002, petitioner and his attorney, Robert Luce, learned that the SEC had initiated an investigation into petitioner's fraudulent scheme. Petitioner told Luce that he was concerned that one of the individuals who had participated in the scheme would cooperate with the SEC. Luce stated that he would defuse the investigation by telling the SEC that he was that individual's attorney and that the individual would assert his Fifth Amendment right against self-incrimination if questioned. Petitioner agreed to that plan knowing that Luce was not the individual's attorney. Pet. App. 43-44.

In March 2003, based on its investigation, the SEC filed a civil securities-fraud suit against petitioner in the Northern District of Illinois. On March 23, 2008, petitioner was served with an asset-freeze order. The order, entered by a federal district judge, barred petitioner, Wetzel, and a company petitioner controlled from transferring, concealing, or otherwise dissipating any property possessed by any of them. Three days later, petitioner withdrew $10,000 from the operating account of his company, deposited the funds into an account he controlled, and used the funds to pay personal expenses. Petitioner also instructed Wetzel to withdraw funds from company accounts that he knew to have been frozen by the court order. Pet. App. 44-45.

2. In April 2005, a grand jury in the Northern District of Illinois returned a 23-count indictment charging petitioner, two of his companies, and eight co-defendants with wire fraud, in violation of 18 U.S.C. 1343; mail fraud, in violation of 18 U.S.C. 1341; securities fraud, in

violation of 15 U.S.C. 77x; obstruction of justice, in violation of 18 U.S.C. 1503(a) and 1505; and criminal contempt of court, in violation of 18 U.S.C. 401(3). Pet. 6; Pet. App. 2. In July 2008, petitioner pleaded guilty, without a plea agreement, to 15 counts of wire fraud, two counts of securities fraud, two counts of obstruction of justice, and one count of criminal contempt of court. Pet. App. 16-18, 29. Petitioner's "Declaration in Support of His Plea of Guilty" set forth the factual basis for the charges and noted petitioner's position that his sentence should be calculated under the 2001 version of the United States Sentencing Guidelines. *Id.* at 45-48.

3. a. The Presentence Investigation Report (PSR) calculated petitioner's recommended sentencing range using the 2008 version of the Guidelines, the version in effect at the time of petitioner's sentencing. PSR 8 (citing *United States* v. *Demaree*, 459 F.3d 791 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007)).[1] To calculate petitioner's offense level, the PSR divided his convictions into two groups, one containing the fraud and contempt counts and the other containing the obstruction-

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[1] The 2001 and 2008 Guidelines differ in only one respect relevant to petitioner's case. Although both versions prescribe a four-level enhancement for crimes involving 50 or more victims, Guidelines § 2B1.1(b)(2)(B), the 2008 Guidelines provide an additional two-level enhancement—a total enhancement of six levels—if the victims number 250 or more. Guidelines § 2B1.1(b)(2)(C). The Sentencing Commission added the additional enhancement via an emergency amendment, effective January 25, 2003. See Guidelines App. C, amend. 647. Petitioner notes (Pet. 4-5) that another amendment, effective November 1, 2003, provides for an increase in the base offense level for fraud offenses from six to seven under specified circumstances. See Guidelines App. C, amend. 653 (adding Guidelines § 2B1.1(a)(1)). That amendment is not relevant to petitioner's case, however, because his case does not present the circumstances that trigger the one-level increase, as both petitioner and the government explained in their court of appeals briefs. See p. 8, *infra*.

of-justice counts. PSR 8. Because the fraud group produced "the highest offense level," see Guidelines § 3D1.3, the PSR used that group to determine the advisory range. The PSR started with a base offense level of 7 because the statutory maximum for one of petitioner's convictions (contempt) was more than 20 years. PSR 9 (citing Guidelines § 2B1.1(a)(1)). Based on enhancements for causing a loss of more than $2.5 million (18 levels), perpetrating a fraud on more than 250 victims (6 levels), playing a leadership role in the offense (4 levels), using sophisticated means (2 levels), violating a judicial order (2 levels), and obstructing justice (2 levels), the PSR determined that petitioner's adjusted offense level was 41. PSR 9-13. The PSR then applied a reduction of 3 levels because petitioner had accepted responsibility by pleading guilty, yielding a total offense level of 38. PSR 15-16.

The PSR determined that petitioner was in criminal history category II, based on his conviction in 2005 for obstructing justice (by making false statements regarding his ability to pay a fine imposed in a previous SEC enforcement action). PSR 17. Accordingly, petitioner's advisory sentencing range under the 2008 Guidelines was 262 to 327 months. PSR 29.

The PSR stated that the advisory range would have been lower under "the November 2002 guideline manual in effect during the commission of the offense." PSR 29. Under the 2002 Guidelines, the PSR estimated, petitioner's total offense level would have been 35 and his advisory range would have been 188 to 235 months.[2]

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[2] The PSR's estimate was inaccurate in two respects. First, it failed to take into account the emergency amendment, effective January 25, 2003, adding the six-level enhancement for a crime involving more than 250 victims. See PSR 29; note 1, *supra*. As petitioner concedes (Pet. 37), that amendment was in effect at the time he committed his con-

b. In his sentencing memorandum, petitioner restated his position that the 2001 Guidelines should be used to calculate his advisory sentencing range. 05-cr-00340 Docket entry No. 338, at 2-4 (N.D. Ill. May 8, 2009) (Dkt. No. 338). At his sentencing hearing on May 14, 2009, however, petitioner objected only to the amount of loss used in determining his offense level and to the two-level enhancement for violating a judicial order. Dkt. No. 407, at 7, 17. The district court heard argument on those objections, overruled them, and asked whether there were "[a]ny other legal issues that the defense wishes to address[.]" *Id.* at 22. Counsel replied that all such issues would "be addressed in [his] remarks under [18 U.S.C.] 3553(a)." *Ibid.* After hearing a lengthy presentation from defense counsel and a statement by petitioner, the district court postponed its sentencing ruling to consider the matter further. The court explained that it needed additional time "to think in terms of [section] 3553[,] * * * in terms of the guidelines [and] * * * in terms of the very positive things" the court had "heard about the defendant." *Id.* at 84.

When the sentencing hearing reconvened the following month, the district court sentenced petitioner to 262 months of imprisonment, to be followed by three years of supervised release. Pet. App. 67-68. The court acknowledged that the advisory Guidelines range was "quite high," that petitioner had accepted responsibility

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tempt and obstruction offenses in the spring of 2003. Second, the PSR failed to take into account Guidelines § 3D1.4(b), which provides for a one-level increase when a defendant commits multiple groups of offenses and the offense level applicable to one group is between five and eight levels lower than the other group. See Pet. App. 5; p. 9, *infra*. Correctly calculated, petitioner's total offense level and advisory range under the 2002 Guidelines would have been the same as his total offense level and advisory range under the 2008 Guidelines applied by the district court. See *ibid.*

by pleading guilty, and that he had cooperated extensively with the government. *Id.* at 63. The court determined, however, that those factors were outweighed by petitioner's role as "the mastermind behind the [fraud] scheme" and the nature of the offenses, which were "well-thought-out crime[s] that took place over several years and required a great deal of planning and precise execution." *Id.* at 63-64. The court also stressed that petitioner had not "learn[ed] from past mistakes," as evidenced by the fact that he committed the instant offenses after previous securities violations that had resulted in actions by the SEC and other federal and state bodies. *Id.* at 65. After petitioner's counsel asked why the court had not varied below the Guidelines based on petitioner's "cooperation nor any of the 3553(a) factors," the court reiterated that it had "take[n] all of those matters into consideration." *Id.* at 69-71. The court stated that it "simply [could not] ignore [petitioner's] role" as the mastermind of the scheme and that it therefore believed that "the guideline sentence is the appropriate sentence in this case." *Id.* at 71.

c. Three days after his sentencing, petitioner filed a motion to correct his sentence under Federal Rule of Criminal Procedure 35(a). As relevant here, he argued that the district court had violated the Ex Post Facto Clause by calculating his advisory range under the 2008 Guidelines rather than the 2001 Guidelines. Dkt. No. 352, at 1-2 (June 12, 2009). The government opposed the motion, asserting that petitioner had conceded that his ex post facto claim was foreclosed by circuit precedent and that, in any event, his claim was based on the erroneous view that the 2001 Guidelines were in effect at the time of his offenses of conviction. The government pointed out that the PSR had identified the 2002 Guidelines as the version in effect during the

commission of the offenses and that petitioner had not "contest[ed] this section of the PSR" at sentencing. Dkt. No. 354, at 2 & n.2 (June 15, 2009).

The district court denied the Rule 35 motion, ruling that petitioner's ex post facto claim was foreclosed by the Seventh Circuit's decision in *Demaree*, *supra*. Pet. App. 14. The court reaffirmed that, "[a]s with all of the factors raised by [petitioner]," the court had "fully considered [his] argument under § 3553 in arriving at a sentence that was sufficient but not greater than necessary to serve the purposes of sentencing." *Id.* at 15.

4. The court of appeals affirmed petitioner's sentence. Pet. App. 1-12. Petitioner first argued, and the government agreed, that the district court had erred in calculating petitioner's Guidelines range because his base offense level should have been 6 under Guidelines § 2B1.1(a)(2), rather than 7 under Guidelines § 2B1.1(a)(1), as determined by the PSR and the district court. Pet. C.A. Br. 15-18; Gov't C.A. Br. 22-26. Section 2B1.1(a)(1) provides for an increase in the base offense level for fraud offenses from 6 to 7 if "the defendant was convicted of an offense referenced to [Guidelines § 2B1.1]" and that offense "has a statutory maximum term of imprisonment of 20 years or more." As petitioner and the government explained, that provision does not apply to petitioner because when he committed his fraud offenses, the statutory maxima for those offenses was less than 20 years, and, although the maximum for his contempt offense exceeded 20 years, that offense is not "referenced to" Guidelines § 2B1.1 but to Guidelines § 2J1.1. See Pet. C.A. Br. 15; Gov't C.A. Br. 24-25; Guidelines § 2B1.1 comment. (n.2(A)); Guidelines § 1B1.2(a); Guidelines App. A.

The court of appeals assumed that the district court had erred in calculating petitioner's offense level, but found that a remand was not warranted because "any error [wa]s harmless." Pet App. 5. The court explained that the one-level reduction identified by the parties would "trigger" the one-level increase to a defendant's total offense level that applies when the defendant is sentenced for two groups of offenses, one of which is between five and eight offense levels "less serious" than the other. *Id.* at 6 (citing Guidelines § 3D1.4(b)). This one-level increase, the court reasoned, would "negat[e] any reduction in the Guideline range." *Ibid.*[3]

After rejecting two of petitioner's other challenges to his sentence, the court of appeals "dispose[d] of" petitioner's argument that the district court's use of the 2008 Guidelines in calculating his sentence violated the Ex Post Facto Clause of the Constitution. Pet. App. 8. The court held that petitioner's argument was "foreclosed by" its previous decision in *Demaree*, *supra*, which had "held that, because the Guidelines are only advisory in nature, a court's use of a later version does not offend" the Ex Post Facto Clause. *Id.* at 9. The court noted that it had repeatedly adhered to that reasoning and found "no reason to abandon that conclusion today." *Ibid.*

ARGUMENT

Petitioner principally contends (Pet. 10-40) that the district court's use of the 2008 edition of the Guidelines to calculate his advisory sentencing range violated the

[3] In applying the one-level increase, the court of appeals necessarily rejected alternative grouping methods proposed by petitioner and the government, such as a single grouping for all offenses, that would not have produced the one-level increase. The petition does not challenge that determination, and the government likewise accepts the determination as law of the case.

Ex Post Facto Clause of the United States Constitution. He argues that this Court should grant review to resolve a disagreement among the courts of appeals on whether the advisory Guidelines implicate the Ex Post Facto Clause. Although the courts of appeals are divided on that question, this case is not an appropriate one in which to resolve the issue. Petitioner's ex post facto claim rests on the premise that the Guidelines in effect at the time of his sentencing prescribed a harsher penalty than the Guidelines in effect at the time of his offense conduct. But that premise depends on the Court's resolving in petitioner's favor a second and separate issue—whether Guidelines § 1B1.11(b), which requires use of the revised edition of the Guidelines to calculate the advisory range when a defendant's offenses occur both before and after revised Guidelines take effect, itself violates the Ex Post Facto Clause. That separate issue was neither presented in nor addressed by the courts below, and petitioner could not prevail on that issue under the plain-error standard that would apply in this Court. The Court should therefore deny the petition for a writ of certiorari.[4]

1. As the government has explained in response to other recent petitions for writs of certiorari raising the issue, applying the advisory Guidelines in effect when a defendant is sentenced does not raise ex post facto concerns, even if those Guidelines recommend a higher sentence than the Guidelines that were in effect when the defendant committed the offense. See, *e.g.*, U.S. Br. in Opp. 9-14, *Hensley* v. *United States*, 130 S. Ct. 1284 (2010) (No. 09-480), 2010 WL 603304, at *6-*9. In *Miller* v. *Florida*, 482 U.S. 423 (1987), this Court held that the Ex Post Facto Clause barred the retroactive application

[4] The first question presented is also presented by *Ortiz* v. *United States*, petition for cert. pending, No. 10-7719 (filed Nov. 24, 2010).

of revised state sentencing guidelines that increased a defendant's presumptive sentencing range compared to the guidelines in effect at the time that the defendant committed the offense. The Court reasoned that the new guidelines, which "ha[d] the force and effect of law," "substantially disadvantaged" the defendant, because the state system created a "high hurdle that must be cleared before discretion [could] be exercised" to impose a non-guidelines sentence. *Id.* at 432, 435. The Court distinguished the Florida guidelines system from the United States Parole Commission's guidelines, noting that the federal parole guidelines "simply provide flexible 'guideposts' for use in the exercise of discretion." *Id.* at 435.

Before *United States* v. *Booker*, 543 U.S. 220 (2005), the federal Sentencing Guidelines (unlike the former federal parole guidelines) were mandatory. Thus, like the Florida guidelines at issue in *Miller*, the federal Sentencing Guidelines both "ha[d] the force and effect of laws," *id.* at 234, and significantly constrained district courts' discretion to impose sentences outside of the Guidelines range. See 18 U.S.C. 3553(b)(1). Courts of appeals had therefore uniformly held that, under *Miller*, the Ex Post Facto Clause precluded applying revised Guidelines provisions that provided for a more severe sentence than authorized by the Guidelines in effect when the defendant committed the offense. See, *e.g.*, *United States* v. *Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994).

This Court's recent decisions explaining the role of the Guidelines in post-*Booker* sentencing, however, have made clear that the Guidelines, far from having the force and effect of laws, are now only advisory and do not limit the discretion of sentencing courts in the manner that the guidelines at issue in *Miller* did. In *Rita* v. *United*

States, 551 U.S. 338, 341, 350-354 (2007), the Court held that sentencing courts cannot presume a sentence within the advisory Guidelines range to be reasonable and cannot presume a sentence outside of the advisory range to be unreasonable. In *Gall* v. *United States*, 552 U.S. 38, 47 (2007), the Court held that a court of appeals cannot apply a "rigid mathematical formula" that would demand an increasingly strong justification the farther a sentence varies from the advisory Guidelines range. And, in subsequent decisions, the Court has made clear both that sentencing courts may vary from the advisory range "based solely on policy considerations, including disagreements with the Guidelines," and that the Guidelines are just "one factor among several" that "courts must consider in determining an appropriate sentence." *Kimbrough* v. *United States*, 552 U.S. 85, 90, 101 (2007) (citation omitted); see *Pepper* v. *United States*, No. 09-6822 (Mar. 2, 2011), slip op. 23 ("[O]ur post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views."); *Spears* v. *United States*, 129 S. Ct. 840, 843 (2009) (per curiam). Finally, the Court has held that no notice is required when a court sentences outside the advisory range based on the sentencing factors in 18 U.S.C. 3553(a), because defendants no longer have "[a]ny expectation subject to due process protection" that they will receive a sentence within the Guidelines range. *Irizarry* v. *United States*, 553 U.S. 708, 713 (2008).

Consistent with this Court's recent decisions, the Seventh Circuit held in *United States* v. *Demaree*, 459 F.3d 791, 794-795 (2006), cert. denied, 551 U.S. 1167 (2007), that the Ex Post Facto Clause does not bar the application of the version of the advisory Guidelines in effect at the time of sentencing, even when the version

of the Guidelines in effect at the time of the offense provided for a lower advisory sentencing range. And the court below correctly concluded that *Demaree* forecloses petitioner's ex post facto claim. Pet. App. 9.

As petitioner notes (Pet. 12-23), four other circuits—the Second, Fourth, Sixth, and the District of Columbia Circuits—have rejected the analysis in *Demaree* and concluded that the Guidelines continue to implicate the Ex Post Facto Clause even though they "are now advisory" only, *Kimbrough*, 552 U.S. at 101 (citation omitted). See *United States* v. *Ortiz*, 621 F.3d 82, 87 (2d Cir. 2010), petition for cert. pending, No. 10-7719 (filed Nov. 24, 2010); *United States* v. *Lewis*, 606 F.3d 193, 199 (4th Cir. 2010); *United States* v. *Lanham*, 617 F.3d 873, 889-890 (6th Cir. 2010); *United States* v. *Turner*, 548 F.3d 1094, 1099-1100 (D.C. Cir. 2008). The remaining seven courts of appeals with criminal jurisdiction, however, have not yet resolved the issue.[5]

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[5] The Fifth, Eighth, and Eleventh Circuits have expressly stated that the issue remains open in their courts. See *United States* v. *Marban-Calderon*, No. 09-40207, 2011 WL 135040, at *1 (5th Cir. Jan. 18, 2011); *United States* v. *Deegan*, 605 F.3d 625, 632 (8th Cir. 2010); *United States* v. *Fowler*, 342 Fed. Appx. 520, 523 (11th Cir. 2009), cert. denied, 130 S. Ct. 2371 (2010). The First Circuit has also declined to "take sides in the inter-circuit conflict," instead adopting a non constitutional "protocol" that district courts should apply the Guidelines in effect at the time of the offense if they are more favorable to the defendant. *United States* v. *Rodriguez*, 630 F.3d 39, 42 (2010). The Third, Ninth, and Tenth Circuits have assumed that the Ex Post Facto Clause continues to limit application of amended Guidelines even under the advisory system, but those courts have not actually decided the issue. To the extent that petitioner suggests (Pet. 12, 15) that the Third Circuit has resolved the issue, he is incorrect. In the published Third Circuit decision on which petitioner relies (Pet. 15), *United States* v. *Wood*, 486 F.3d 781, 790-791, cert. denied, 552 U.S. 855 (2007), the court of appeals accepted the government's concession that the district court had applied the

2. Whether or not this Court's resolution of the circuit conflict might be warranted in an appropriate case, this case is not a suitable one in which to resolve the issue, for two reasons: first, the record suggests that petitioner would likely have received the same sentence even if the district court had used the 2001 Guidelines to calculate his advisory sentencing range; and, second, determining whether petitioner's advisory range under the Guidelines in effect at sentencing was in fact higher than the advisory range under the Guidelines in effect at the time of his offense would require the Court to resolve an antecedent constitutional question that was not presented in or decided by the courts below.

a. As an initial matter, this case is not an appropriate vehicle to address petitioner's ex post facto claim because the district court's explanation of its sentencing decision indicates that the court would have imposed the same sentence even if it had used the 2001 Guidelines as petitioner requested. Under those Guidelines, petitioner's offense level would have been 36 and his advisory sentencing range would have been 210 to 262 months of imprisonment.[6] The 262-month term that the

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wrong version of the Guidelines, but the appellate court did not itself decide the ex post facto question.

[6] Under the 2001 Guidelines, petitioner's base offense level for the fraud offense grouping would have been 6. See Sentencing Guidelines § 2B1.1(a). After enhancements of 18 levels for causing a loss of more than $2.5 million (*id.* § 2B1.1(b)(1)(J)), 4 levels for perpetrating a fraud on more than 50 victims (*id.* § 2B1.1(b)(2)(B)), 2 levels for violating a court order (*id.* § 2B1.1(b)(7)(C)), 2 levels for using sophisticated means (*id.* § 2B1.1(b)(8)(C)), 4 levels for a leadership role in the offense (*id.* § 3B1.1(a)), and 2 levels for obstruction of justice (*id.* § 3C1.1), his adjusted offense level would have been 38. Because that offense level is within 5 levels of the adjusted offense level of 32 for the obstruction grouping (see *id.* §§ 2J1.2(c)(1), 2X3.1(a), 3B1.1(a)), the grouping enhancement of 1 level identified by the court of appeals would apply (see

district court imposed would thus remain within the advisory range, and the sentencing record provides no indication that the court would have imposed a lower sentence. The court heard extensive arguments from petitioner in support of a sentence of less than 262 months, acknowledged both the severity of that sentence and the value of petitioner's cooperation, and still determined that a 262-month term of imprisonment was "sufficient but not greater than necessary to comply with the purposes" of sentencing set forth in 18 U.S.C. 3553(a). Pet. App. 62, 71; see *id.* at 15. Indeed, the court adhered to that determination even after petitioner's counsel questioned the court about its refusal to impose a lower sentence and filed a post-sentencing motion seeking to reduce petitioner's sentence on two additional grounds. See *id.* at 15, 69-71.

The district court stated that it believed a sentence within the Guidelines range was "the appropriate sentence in this case." Pet. App. 71. Unlike with co-defendant Christine Favara, however, the court did not indicate an "intent" to sentence petitioner at the low end of the Guidelines range, whatever that range was. See *id.* at 10 (explaining that the district judge adjusted Favara's sentence to reflect the low end of the Guidelines range as corrected following an initial error in calculation). The court instead specifically found that a term of 262 months was "sufficient but not greater than necessary to serve the purposes of sentencing," *id.* at 15, 62, and based that conclusion on the severity of peti-

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Pet. App. 5; Guidelines § 3D1.4(b)). That enhancement, combined with a reduction of 3 levels for acceptance of responsibility and a timely guilty plea (Guidelines § 3E1.1), would yield a total offense level of 36. Combined with petitioner's criminal history category of II, that offense level would produce an advisory range of 210 to 262 months of imprisonment. See *id.* Ch. 5, Pt. A (Sentencing Table).

tioner's offense conduct, his role as the "mastermind" of the fraud scheme, and his commission of the instant offenses after previous securities law violations, *id.* at 63-66. The record thus strongly suggests that the court would have imposed the same 262-month sentence whether that sentence was at the low end or the high end of the advisory Guidelines range.

b. This case is a poor vehicle for addressing petitioner's ex post facto claim for another reason as well. Petitioner's claim is based on the premise that the 2008 Guidelines applied by the district court yielded a higher advisory range than the Guidelines in effect at the time of his offense conduct, which petitioner suggests were the 2001 Guidelines. Pet. 7, 38-39. That premise would only be correct, however, if the Court resolved in petitioner's favor a separate, threshold issue that has itself divided the circuits but that was not raised in or addressed by the courts below.

i. Petitioner's offense conduct straddled two different versions of the Guidelines. He pleaded guilty not only to wire and securities fraud, based on his conduct in 2001 and 2002, but also to obstruction of justice and contempt of court, based on actions he took in March and April of 2003. Although the 2001 Guidelines were in effect when petitioner committed the wire and securities fraud offenses, the 2002 Guidelines, as amended by the January 25, 2003 emergency amendment, were in effect when petitioner committed the contempt and obstruction offenses. See Pet. 37 (conceding that fact). Guidelines § 1B1.11(b)(3) tells sentencing courts what to do in those circumstances (to the extent the courts are using the Guidelines in effect at the time of the offense, rather than those in effect at sentencing). That provision instructs courts to apply "the revised edition of the Guidelines Manual * * * to both [sets of] offenses." Guide-

lines § 1B1.11(b)(3). Commonly called the "one-book rule," the provision thus requires sentencing courts to determine the offense level for all counts of conviction using the Guidelines "manual in effect at the time the last offense of conviction was completed." *Id.* § 1B1.11 comment. (backg'd.).

Petitioner would not have been subject to a more favorable advisory sentencing range under the Guidelines "in effect at the time the last offense of conviction was completed." Guidelines § 1B1.11 comment. (backg'd.). Under the 2002 Guidelines as amended, petitioner would have been subject to the same set of offense-level enhancements contained in the 2008 Guidelines—including the increase of 6 levels for a fraud against more than 250 victims, Guidelines § 2B1.1(b)(2)(C), which forms the basis for his ex post facto claim. See Pet. 4; Pet. App. 9. Petitioner's base offense level under the 2002 Guidelines as amended would have been six, which the parties agreed on appeal (and the court of appeals accepted arguendo) was also the correct base offense level under the 2008 Guidelines. See pp. 8-9, *supra*; Pet. App. 4–6. But, under the 2002 Guidelines, as under the 2008 Guidelines, petitioner would also have been subject to the one-level increase under the grouping rules that the court of appeals identified. See Pet. App. 5-6; Guidelines § 3D1.4(b). The upshot is that petitioner would have faced the same total offense level (38) and the same advisory sentencing range (262 to 327 months) under the amended 2002 Guidelines as under the 2008 Guidelines used by the district court. See note 2, *supra*.

ii. The only way that petitioner can avoid that result, and establish that he faced a less-favorable advisory range under the 2008 Guidelines, is to show that the one-book rule in Guidelines § 1B1.11(b)(3) cannot be applied

to him. Petitioner urges the Court (Pet. 33-40) to reach that conclusion, arguing that application of the one-book rule would itself violate the Ex Post Facto Clause.

Petitioner did not, however, present that argument in the district court or the court of appeals, and neither of those courts addressed it. On the contrary, in the district court, petitioner did not object to the PSR's statement that the 2002 Guidelines were the ones "in effect during the commission of the offense." PSR 29. Nor, following his motion to correct his sentence, did petitioner respond to the government's arguments that the PSR was correct on this point and that petitioner had failed to object to the relevant portion of the PSR at the sentencing hearings. See Dkt. No. 354, at 2 n.2 (June 15, 2009). In his brief to the court of appeals, petitioner even recited the PSR's statement that the 2002 Guidelines were the ones in effect during the commission of his offenses, although he also repeated the PSR's erroneous estimate that the offense level under the 2002 Guidelines would have been 35. Pet. C.A. Br. 36; see note 2, *supra* (explaining errors in PSR's offense-level estimate under 2002 Guidelines).

To decide whether the factual premise for petitioner's principal claim is correct, therefore, the Court would have to address a threshold constitutional question that was not raised in or resolved by the courts below. This Court is, however, one "of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and it does not ordinarily address issues that were neither pressed nor passed upon in the court of appeals, see *United States* v. *Williams*, 504 U.S. 36, 41 (1992). The Court should therefore decline to consider petitioner's challenge to the one-book rule.

iii. Resolution of that challenge is especially unwarranted because, by failing to raise the challenge in the

district court or the court of appeals, petitioner forfeited his constitutional claim. The challenge to the one-book rule would thus be reviewed only for plain error. See Fed. R. Crim. P. 52(b). Petitioner would have to show that applying the amended 2002 Guidelines in his case would be error; that the error is clear or obvious; that the error affected his substantial rights; and that the error seriously affected the fairness, integrity, or public reputation of the proceedings. See *United States* v. *Marcus*, 130 S. Ct. 2159, 2164 (2010). Petitioner could not make that showing.

Petitioner could not show any effect on his substantial rights because, for the reasons described above, the district court would not have imposed a lower prison term even if the court had used the 2001 version of the Guidelines. See pp. 14-16, *supra*. And petitioner could not show that any error in applying the amended 2002 Guidelines under the one-book rule would be clear or obvious. As petitioner points out (Pet. 35), the courts of appeals are divided on the question of whether the one-book rule violates the Ex Post Facto Clause.[7] In those

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[7] Compare *United States* v. *Kumar*, 617 F.3d 612, 628 (2d Cir. 2010) (the one-book rule "does not violate the *Ex Post Facto* clause when applied to the sentencing of offenses committed both before and after the publication of a revised version of the Guidelines"), petition for cert. pending, No. 10-961 (filed Jan. 24, 2011); *United States* v. *Duane*, 533 F.3d 441, 449 (6th Cir. 2008) (same); *United States* v. *Sullivan*, 255 F.3d 1256, 1262-1263 (10th Cir. 2001) (same), cert. denied, 534 U.S. 1166 (2002); *United States* v. *Lewis*, 235 F.3d 215, 218 (4th Cir. 2000) (same), cert. denied, 534 U.S. 814 (2001); *United States* v. *Vivit*, 214 F.3d 908, 919 (7th Cir.) (same), cert. denied, 531 U.S. 961 (2000); *United States* v. *Kimler*, 167 F.3d 889, 893-895 (5th Cir. 1999) (same); *United States* v. *Bailey*, 123 F.3d 1381, 1404-1407 (11th Cir. 1997) (same); and *United States* v. *Cooper*, 35 F.3d 1248, 1251-1252 (8th Cir. 1994) (same), vacated, 514 U.S. 1094 (1995), reinstated, 63 F.3d 761, 762 (8th Cir. 1995), with *United States* v. *Ortland*, 109 F.3d 539, 547 (9th Cir.) (one-book rule violates the Ex Post Facto Clause where defendant's "sen-

circumstances, an error cannot be clear or obvious. See, *e.g.*, *United States* v. *Williams*, 469 F.3d 963, 966 (11th Cir. 2006) (no plain error when there is no controlling case law and circuits are split); *United States* v. *Teague*, 443 F.3d 1310, 1319 (10th Cir.) (same), cert. denied, 549 U.S. 911 (2006); see also *United States* v. *Castillo-Estevez*, 597 F.3d 238, 241 (5th Cir.) (where circuits divided on merits of ex post facto challenge, the case law revealed a "reasonable dispute" about issue and precluded a finding of plain error), cert. denied, 131 S. Ct. 457 (2010).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
LANNY A. BREUER
Assistant Attorney General
SCOTT A.C. MEISLER
Attorney

MARCH 2011

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tence on earlier, completed counts [is] increased by a later Guideline"), cert. denied, 552 U.S. 851 (1997); *United States* v. *Bertoli*, 40 F.3d 1384, 1404 (3d Cir. 1994) (same), cert. denied, 517 U.S. 1137 (1996).

No. 10-631

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In The
Supreme Court of the United States

FRANK CUSTABLE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

MARC W. MARTIN*
**Counsel of Record*
MARC MARTIN, LTD.
53 West Jackson Blvd.
Suite 1420
Chicago, IL 60604
(312) 408-1111
mwm711@mac.com

JEFFREY B. STEINBACK
53 West Jackson Blvd.
Suite 1442
Chicago, IL 60604
(847) 624-9600

Counsel for Petitioner Frank Custable

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF FOR PETITIONER

The government's brief is more noteworthy for what it lacks than what it contains. While not disputing that the circuits are firmly divided on both questions presented in the petition, it defends the Seventh Circuit's approach only in conclusory terms. See Op. 12-13.[1] Nowhere does the government address this Court's *ex post facto* jurisprudence. While relying on the advisory nature of the Guidelines as a reason for avoiding petitioner's *ex post facto* claim, the government does not cite, let alone address, cases such as *Garner v. Jones*, 529 U.S. 244, 255 (2000), or *California Department of Corrections v. Morales*, 514 U.S. 499, 509 (1995), which make clear that the relevant *ex post facto* test is whether there is a "substantial risk" that retroactive application of a penal law will increase punishment. See Pet. 25-26. Nor has the government addressed statistics demonstrating the practical viability of the *ex post facto* objection in this case.

The government attempts to divert attention by positing a plain error theory. But this "defense" is not

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[1] The government notes that the *ex post facto* issues presented in Questions 1 and 2 of the petition are also before this Court in *Ortiz v. United States*, No. 10-7719 (Question 1), in which the government filed its opposition on the same day as it filed the opposition brief in this case, and *Kumar v. United States*, No. 10-961 (Question 2), in which the government's response to the certiorari petition is presently due by March 30, 2011.

invoked on Question 1 of the petition. Concerning Question 2, the plain error rule is inapplicable because petitioner brought his *ex post facto*-based objection to the attention of the district court and the court of appeals. See Fed. R. Crim. P. 51(b).

I. The Government Has Not Dispelled That The Circuit Split Over The Role Of The *Ex Post Facto* Clause In Post-*Booker* Sentencings Is In Urgent Need Of This Court's Resolution

The government admits that "the courts of appeals are divided" on the question of whether, in the aftermath of *United States v. Booker*, 543 U.S. 220, 262 (2005), retroactive application of more onerous Guidelines violates the *Ex Post Facto* Clause. Opp. 10. In its sparing defense of the Seventh Circuit's approach, the government references its "response to other recent petitions for writs of certiorari." *Id.* Cited here is the government's response in *Hensley v. United States*, 130 S. Ct. 1284 (2010) (No. 09-480), 2010 WL 603304, at 6-9. Petitioner, too, cited the certiorari proceedings in *Hensley*, noting that the government in that case had acknowledged a circuit split, but sought more time to advance its position in the courts of appeal.[2] In its brief, the government does

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[2] The government maintains that the petition suggested that the Third Circuit has resolved the issue in *United States v. Wood*, 486 F.3d 781 (3d Cir. 2007). Opp. 13 n. 5. Petitioner did not go that far. See Pet. 15.

not address significant developments since this Court denied certiorari in *Hensley*, namely, that the government has unsuccessfully petitioned certain courts of appeals to fall in line with *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006). Although not mentioned in the government's brief, since the filing of the petition in this case, the Sixth Circuit denied the Solicitor General's petition for rehearing en banc in *United States v. Lanham*, 617 F.3d 873 (6th Cir. 2010) (Rehearing and Rehearing En Banc Denied Dec. 17, 2010).

The government essentially contends that *Booker* sub silentio overruled *Miller v. Florida*, 482 U.S. 423 (1987). According to the government, *Booker* and later cases have made clear that the Guidelines lack the "force and effect of laws." Opp. 11. But the effect of *Booker* on *ex post facto* analysis *is* the question presented here. Moreover, the Guidelines still play an important role in post-*Booker* sentencings, as they did below where the district court imposed a sentence within the Guidelines range. As this Court recently stated in *Pepper v. United States*:

> [W]e have recognized that the Commission post-*Booker* continues to "fil[l] an important institutional role" because "[i]t has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise." *Kimbrough*, 552 U.S., at 109, 128 S.Ct. 558 (internal quotation marks omitted). Accordingly, we have instructed that district courts must still give "respectful

> consideration" to the now-advisory Guidelines (and their accompanying policy statements). *Id.*, at 101, 128 S.Ct. 558.

No. 09-6822, 2011 WL 709543, *15 (March 2, 2011).

Furthermore, *Booker* did not and could not change the structure of the Guidelines, i.e., that they are "laws" implemented by Congress. See Pet. 3-4. Nor has the government cited any court of appeals case holding that the Guidelines are no longer "laws." Even *Demaree* found that Congress could not evade *ex post facto* prohibitions "by delegating penal authority to an agency." *Demaree*, 459 F.3d at 793.

To be sure, the argument in favor of displacing the *Ex Post Facto* Clause in federal sentencing depends on the Guidelines' advisory nature. In *Garner*, however, this Court determined that the prohibition against *ex post facto* laws does not lose relevance just because an element of discretion is involved in the decision-making process. As noted, the government does not cite or discuss *Garner*.

II. The Record Does Not Support The Government's Argument That The District Court Would Have Imposed The Same Sentence In The Face Of Lower Guidelines And If There Is Error In Petitioner's Guideline Calculation It Would Be For The District Court To Refashion The Sentence In The First Instance

A. The government invokes a harmless error argument of sorts. It maintains that the district court

"would have imposed the same sentence even if it had used the 2001 Guidelines as petitioner requested." Opp. 14. The record, however, simply does not support the government's position. *At no time did the district court state that it would have imposed the same sentence if the applicable advisory sentencing range had been lower.* Nor did the district court articulate any reasons as to why a sentence above the low-end of the applicable Guidelines range would be appropriate. It is also clear that the 2008 Guidelines played a significant role in the court's choice of sentence. The court sua sponte continued the sentencing hearing, in part, because it "need[ed] time . . . to think in terms of the guidelines." Pet.App. 59. The district court commenced the next court appearance (at which it imposed sentence) by stating that it had "been over what the guidelines are as set forth in the presentence report." Pet.App. 61-62. The court further noted "that the advisory guideline range is quite high, 262 months to 327 months." Pet.App. 53. In sentencing petitioner to 262 months in prison, the district court did not select the prison term sentence out of "thin air," *United States v. Turner*, 548 F.3d 1094, 1100 (D.C. Cir. 2008) – it *was* the low-end of the sentencing range under the 2008 Guidelines. After the court imposed the 262-month sentence, petitioner's counsel remarked that the sentence did not "provide for any departure from the bottom of the guideline range" based on 18 U.S.C. § 3553(a) factors and petitioner's cooperation. Pet.App. 69. In response, the court stressed, "I think the guideline sentence is the appropriate sentence in this case." Pet.App. 71.

Lastly, under this Court's decision in *Gall v. United States*, 552 U.S. 38, 49 (2007), a sentencing court has an obligation to compute the Guidelines correctly as the first step in the sentencing process. If petitioner is correct in his *ex post facto* contention, then serious procedural error – which is not otherwise cured by the district court's pronouncements in this case – infects the sentencing proceeding in this case. See *United States v. Lewis*, 606 F.3d 193, 200 (4th Cir. 2010); Pet. 17.

B. The government advances an exotic but undeveloped law of the case argument. See Opp. 9 n. 3 & 14. The government concedes that the 2001 Guidelines, and 2002 Guidelines for that matter, set the base offense level at Level 6 for the fraud convictions, as opposed to the Level 7 found by the district court using the 2008 Guidelines. Petitioner argued in the court of appeals that the base level should have been set at Level 6 because he did not face a 20-year maximum prison sentence for his fraud convictions, as required to increase the base offense level to Level 7 under U.S.S.G. § 2B1.1(a)(1) (2008). See Opp. 7. This argument was separate from petitioner's *ex post facto* objection. See *United States v. Custable*, No. 09-2593, Deft's Brief, pp. 12-17. In the court of appeals, the government conceded error on petitioner's Guidelines-based objection, but the Seventh Circuit did not

accept the concession and refused to remand on the basis of the plain error doctrine.[3] Pet.App. 4-5.

If petitioner is correct in his *ex post facto* argument, then the base offense level undisputedly would be one-level lower than that found by the district court. If error infects the sentence, then the sentence ought to be vacated in its entirety, and left for the sentencing judge to address the effect of the error. Cf. *Pepper*, 2011 WL 709543, *18; *Greenlaw v. United States,* 554 U.S. 237, 253-54 (2008); *Gardner v. Florida*, 430 U.S. 349, 362 (1977). Indeed, this Court normally formulates the legal rule in a given case – here, whether the *Ex Post Facto* Clause applies at post-*Booker* sentencings – and leaves harmless error consideration for the lower courts. E.g., *Neder v. United States*, 527 U.S. 1, 25 (1999); cf. *Black v. United States*, 130 S. Ct. 2963, 2970 (2010); *Skilling v. United States*, 130 S. Ct. 2896, 2934 (2010). The law of the case doctrine would not bind the district court from Guidelines recalculation, *Pepper*, 2011 WL 709543, *18-19, including acceptance of the government's concession regarding the grouping error in this case. See Opp. 9 n. 3. That the court of appeals refused to remand on a separate unpreserved issue

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[3] The government does not invoke plain error as to Question 1. Petitioner's guilty plea declaration, Pet.App. 45-46, sentencing memorandum/PSR objections, R. 338, and motion to correct sentence, R. 352, all raised *ex post facto* objections to application of the 2008 Guidelines. Petitioner's written objections sufficed to preserve the point. See, e.g., *United States v. Smith*, 332 F.3d 455, 458 (7th Cir. 2003).

thus does not pose an impediment to this Court's review.

III. Plain Error Review Of Question 2 Is Inapplicable Because Petitioner Brought His Ex Post Facto Objection To The Lower Courts' Attention

The government attempts to avoid full merits review of Question 2 on plain error grounds. Rule 52(b) of the Federal Rules of Criminal Procedure provides, "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

To avoid forfeiture, a litigant must "make timely assertion of the right before a tribunal having jurisdiction to determine it." *Puckett v. United States*, 129 S. Ct. 1423, 1428 (2009) (quoting *Yakas v. United States*, 321 U.S. 414, 444 (1944)); see also *Johnson v. United States*, 520 U.S. 461, 465 (1997); *United States v. Olano*, 507 U.S. 725, 731 (1993). Rule 51(b) of the Federal Rules of Criminal Procedure describes a litigant's responsibilities in this regard:

> A party may preserve a claim of error by informing the court – when the court ruling or order is made or sought – of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection.

Puckett discussed the reasons for the plain error rule:

> This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute. In the case of an actual or invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome. And of course the contemporaneous-objection rule prevents a litigant from "'sandbagging'" the court – remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.

129 S. Ct. at 1428.

The government does not and cannot contend that petitioner failed to "inform[ ] the court . . . of the action the party wishe[d] the court to take." Both in the written guilty plea declaration, Pet.App. 45-46, and his written pre-sentencing submission, R. 338, petitioner informed the district court that he sought to be sentenced under the 2001 Guidelines (which called for an offense level 3 levels lower than the 2008 Guidelines). Petitioner also informed the court of the "grounds for the objection," i.e., the *Ex Post Facto* Clause's prohibition against retroactive application of disadvantageous penal provisions. Accordingly, the PSR expressly recognized that the 2002 Guidelines

were more favorable to the defendant.[4] PSR 8, 29. And in his motion to correct sentence, which the district court addressed on the merits, petitioner re-asserted his *ex post facto*-based objection. R. 352.

In addition, both in his sentencing memorandum, R. 338, and his court of appeals brief, Deft's Brief, p. 34, petitioner generally cited the Guidelines provision containing the "one-book rule," U.S.S.G. § 1B1.11. Petitioner's goal was to have his Guidelines calculated on the basis of lower, more advantageous Guidelines, and § 1B1.11(b)(1) recognizes that Guidelines potentially may violate the *Ex Post Facto* Clause. Thus, the underlying *ex post facto* ground for petitioner's objection was brought to the lower courts' attention. That petitioner did not emphasize the aspect of the Guideline that might aid the government's position does not transform the nature of petitioner's objection, or work forfeiture of his *ex post facto* rights. See, e.g., *United States v. O'Neill*, 116 F.3d 245, 247 (7th Cir. 1997) (defendant "not required to adhere to any 'formalities of language and style' to preserve his objection"); cf. *United States v. Whitaker*,

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[4] The government maintains that the 2002 Guidelines, rather than 2001 Guidelines, is the germane earlier version of the Guidelines. Pet. 7-8. Insofar as this case is concerned, there is no material difference between the 2001 and 2002 Guidelines. Both produced an offense level 3 levels lower than that found by the district court. Although not discussed in the PSR, the parties here agree that the 6-level enhancement for more than 250 victims, U.S.S.G. § 2B1.1(b)(2)(C), did not go into effect until January 25, 2003.

127 F.3d 595, 601 (7th Cir. 1997) ("Citing the particular provision of the rule is not necessary if counsel states the reasons for the objection or . . . it is clear from context.").

Furthermore, both at the time of his sentencing and appeal, the Seventh Circuit was firmly entrenched in its post-*Booker ex post facto* position. Indeed, the Seventh Circuit has/had consistently refused to reconsider *Demaree*, see Pet. 14-15, and no judge on the Seventh Circuit has/had ever questioned the decision. Obviously, the district court lacked authority to overturn *Demaree*. Under the circumstances, elaborate arguments were not necessary to preserve petitioner's *ex post facto* objection. As stated in *United States v. Messino*, 382 F.3d 704, 714-15 (7th Cir. 2004) (Easterbrook, J., concurring):

> [T]he United States [has] contended that the defendants had not adequately preserved an argument based on *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and that our review therefore is limited to a search for plain error. All three members of the panel disagree with that position. Both [appellants] advanced in their opening briefs arguments based on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which led to *Blakely* and *Booker*. True, appellants did not develop these arguments at length in either the district court or their appellate briefs, but the law was so firmly against them that elaboration would have been

> pointless. When precedent is adverse, a few sentences flagging the point suffice to preserve an argument for resolution by a higher court.

See also *Buchmeier v. United States,* 581 F.3d 561, 566 (7th Cir. 2009) (en banc).

Still more, the government acknowledges that the courts of appeals are divided on whether the *Ex Post Facto* Clause may prevent application of the "one-book rule." Opp. 19 n. 7. The Seventh Circuit's approach is encompassed in *United States v. Vivit,* 214 F.3d 908, 919 (7th Cir. 2000). As petitioner noted, Pet. 34, *Demaree* subsumes *Vivit*. If the *Ex Post Facto* Clause plays no role at a post-*Booker* sentencing, then the Clause necessarily would not preclude application of the "one-book rule." There is no question that petitioner repeatedly challenged and cited *Demaree* in the lower courts. Because the action petitioner sought – use of earlier Guidelines – and the ground for his objection – the *Ex Post Facto* Clause – were brought to the lower courts' attention, the plain error rule does not apply to Question 2.

Even if the plain error does apply, petitioner is eligible for relief. In view of this Court's treatment of the *Ex Post Facto* Clause, it is plain error to increase punishment through retroactive application of penal laws. E.g., *Miller*, 482 U.S. 423.[5] Here, retroactive

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[5] The government's theory that there cannot be plain error if the circuits are split, Pet. 19-20, is unsound, as it fails to

(Continued on following page)

application of U.S.S.G. § 2B1.1(b)(2)(C) (2008), resulted in a significant increased risk of additional punishment. That satisfies the third and fourth prongs of the plain error rule. Cf. *Glover v. United States*, 531 U.S. 198, 202 (2001) (government concedes that an increase in a prison term is prejudicial).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARC W. MARTIN*
*Counsel of Record
MARC MARTIN, LTD.
53 West Jackson Blvd.
Suite 1420
Chicago, IL 60604
(312) 408-1111
mwm711@mac.com
Counsel for Petitioner
Frank Custable

JEFFREY B. STEINBACK
53 West Jackson Blvd.
Suite 1442
Chicago, IL 60604
(847) 624-9600

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recognize that the Constitution or a decision of this Court may be the foundation for a plain error. Under the government's view, no defendant would be entitled to relief from this Court if the circuits are split. While the government's position may state a rule for the courts of appeals, it does not state one for this Court.